BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

TOM FORESE – Chairman
BOB BURNS
ANDY TOBIN
BOYD W. DUNN
JUSTIN OLSON

In the matter of:

TRI-CORE COMPANIES, LLC, an Arizona limited liability company,

TRI-CORE MEXICO LAND DEVELOPMENT, LLC, an Arizona limited liability company,

TRI-CORE BUSINESS DEVELOPMENT, LLC, an Arizona limited liability company,

ERC COMPACTORS, LLC, an Arizona limited liability company,

ERC INVESTMENTS, LLC, an Arizona limited liability company,

C&D CONSTRUCTION SERVICES, INC., a Nevada corporation,

PANGAEA INVESTMENT GROUP, LLC, an Arizona limited liability company, d/b/a Arizona Investment Center,

JASON TODD MOGLER, an Arizona resident,

BRIAN N. BUCKLEY and CHERYL BARRETT BUCKLEY, husband and wife,

CASIMER POLANCHEK, an Arizona resident,

NICOLE KORDOSKY, an Arizona resident,

Respondents.

DOCKET NO. S-20867A-12-0459

DECISION NO. 76452

Arizona Corporation Commission
DOCKETED

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DOCKETED BY

OPINION AND ORDER

DATES OF HEARING: October 21-23, 2014, February 18-20, 2014, and May 6-8, 2014

PLACE OF HEARING: Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE: Marc E. Stern[1]

APPEARANCES: Jason Todd Mogler, Pro Per and on behalf of Tri-Core Companies, LLC, and Tri-Core Business Development, LLC;[2]

Ms. Nicole Kordosky, Pro Per;[3]

Mr. Dale B. Rycraft, Jr., THE RYCRAFT LAW FIRM, PLLC, and Ms. Irma Huerta, on behalf of C&D Construction Services, Inc.;[4] and

Ms. Stacy Luedtke, Staff Attorney, on behalf of the Securities Division of the Arizona Corporation Commission.

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[1] Judge Stern presided at the hearing and during all pre-hearing matters; Judge Jane Rodda prepared the Recommended Opinion and Order.

[2] Mr. Bobby O. Thrasher, Jr., THRASHER JEMSEK, had represented Tri-Core Companies, LLC; Tri-Core Business Development, LLC; ERC Compactors, LLC; ERC Investments, LLC; and Jason Todd Mogler until his withdrawal was granted. Mr. Thrasher filed a Notice of Withdrawal from his representation on account of a conflict of interest, and his withdrawal was granted on February 14, 2014.

[3] On January 7, 2014, a consent order was entered against Respondent Kordosky in Decision No. 74251. Ms. Kordosky appeared during the October hearing dates, but did not participate in the hearing after Decision No. 74251 was issued.

[4] Mr. Rycraft's Motion to Withdraw as counsel for C&D Construction Services, Inc. was granted by Procedural Order on January 28, 2014.

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BY THE COMMISSION:

DISCUSSION

I. Procedural History

On November 8, 2012, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing ("Notice") against Tri-Core Companies, LLC, ("TCC"); Tri-Core Mexico Land Development, LLC ("TCMLD"); Tri-Core Business Development, LLC ("TCBD"); ERC Compactors, LLC ("ERCC"); ERC Investments, LLC ("ERCI"); C&D Construction Services, Inc. ("C&D"); Pangaea Investment Group, LLC ("Pangaea"), d/b/a Arizona Investment Center ("AIC"); Jason Todd Mogler ("Mogler"); Brian N. Buckley and Cheryl Barrett Buckley, husband and wife; Casimer Polanchek; and Nicole Kordosky (collectively "Respondents"). In the Notice, the Division alleged multiple violations of the Arizona Securities Act ("Act") in connection with the offer and sale of securities in the form of notes.[5]

The Respondents were duly served with a copy of the Notice.

On November 26, 2012, a request for hearing was filed on behalf of C&D.

On November 30, 2012, Respondents TCC, TCBD, ERCC, ERCI, Jason Todd Mogler ("Mogler"), Brian N. Buckley and Cheryl Barrett Buckley filed requests for hearing.

On December 10, 2012, by Procedural Order, a pre-hearing conference was scheduled on January 15, 2013.

On January 15, 2013, at the pre-hearing conference, Respondents TCC, TCBD ERCC, ERCI, and Mogler appeared through counsel. Respondents Brian and Cheryl Buckley appeared on their own behalf. The Division also appeared through counsel. Although the Respondents who requested a hearing were discussing a possible settlement, the Division requested a status conference be scheduled to determine if a hearing should be scheduled in the event settlement did not occur.

On January 16, 2013, by Procedural Order, a status conference was scheduled on March 20,

[5] On February 6, 2013, the Commission issued Decision Nos. 73666 and 73667 against Pangaea and TCMLD, respectively, as Default Orders finding them in violation of the Act. On May 8, 2013, the Commission issued Decision No. 73867, a Default Order, against Respondent Polanchek, finding him in violation of the Act. On October 25, 2013, the Commission issued Decision No. 74147, a Consent Order, against the Buckley Respondents, finding him in violation of the Act and holding the Buckleys' marital community liable. On January 7, 2014, the Commission issued Decision No. 74251, a Consent Order, against Respondent Kordosky.

2013.

On January 29, 2013, Respondent Nicole Kordosky filed a request for hearing.

On January 31, 2013, by Procedural Order, Respondent Nicole Kordosky's name was added to the service list, and she was apprised of the status conference scheduled for March 20, 2013.

On February 6, 2013, Default Orders were entered against Respondents Pangaea and TCMLD, respectively, in Decision Nos. 73666 and 73667.

At the March 20, 2013, status conference, the Division appeared through counsel; Respondents TCC, TCBD, ERCC, ERCI, and Mogler appeared through their counsel, Mr. Bobby Thrasher; Respondent C&D appeared through its counsel, Dale Rycraft, Jr.; and Respondents Brian Buckley and Nicole Kordosky appeared on their own behalves. Mrs. Buckley did not appear. The Division's counsel indicated that while settlement discussions were ongoing, a hearing should be scheduled in the fall to avoid scheduling conflicts, as the Division expected a lengthy proceeding given the large number of witnesses and exhibits. Additionally, Mr. Thrasher expected to call a large number of witnesses.

On March 21, 2013, by Procedural Order, a hearing was scheduled to commence on October 7, 2013 and continue over a number of weeks.

On April 4, 2013, the Division filed a Motion to Continue ("Motion") the hearing until October 2013 due to the unavailability of a key witness during the scheduled hearing. The Division indicated that counsel for the represented Respondents as well as the pro per Respondents had been contacted, and had no objections to the Motion.

On April 24, 2013, by Procedural Order, the Division's Motion was granted and the hearing was continued to October 21, 2013.

On May 8, 2013, a Default Order was issued against Respondent Casimer Polanchek in Decision No. 73867.

On September 11, 2013, the Division filed a Motion to Allow Telephonic Testimony of approximately six witnesses who mostly resided out of state. There were no objections to this motion.

On September 20, 2013, the Division filed a Stipulation to Partially Continue the Hearing Dates because counsel for the majority of the Respondents had a conflict due to a criminal matter projected

to last eight weeks, which the judge refused to continue in deference to the Commission's proceeding. The parties agreed to proceed with the first two weeks of hearing in October 2013 as scheduled, and to continue in February or March 2014.

On October 4, 2013, by Procedural Order, telephonic testimony was authorized, and a portion of the proceeding was continued to February 2014, as agreed by the parties.

On October 21, 2013, a public hearing convened before a duly authorized Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. The Division, TCC, TCBD, ERCC, ERCI, Mogler, and C&D appeared with counsel. Ms. Kordosky appeared on her own behalf. The Buckleys did not appear.

On October 23, 2013, at the beginning of the proceeding, Mr. Bobby Thrasher, counsel for TCC, TCBD, ERCC, ERCI, and Mogler, stated that an issue had arisen with respect to his continued representation of ERCC and ERCI ("ERC Entities"). Counsel related that the ERC Entities had been sold by Respondent Mogler in March 2013 to a non-party to the proceeding, Mr. Guy Quinn. Mr. Thrasher provided a copy of the Purchase Contract, which did not appear to be either complete or a final agreement. Mr. Thrasher stated that although he had initially represented the ERC Entities, he believed that a clear conflict of interest existed and that he could no longer represent the ERC Entities without prejudice to them and their new owner. Mr. Thrasher further indicated that he wished to file a Motion to Withdraw as counsel for the ERC Entities and requested that the balance of the proceeding be continued and resume in February as previously ordered.

Counsel for the Division indicated that she had been unaware of this conflict previously; had only been apprised of this situation shortly before the hearing on October 23, 2013; and had been surprised by these requests.

The parties ultimately agreed that the proceeding should be continued to February and that a Motion to Withdraw and a Motion for a Procedural Conference would be filed.

On October 25, 2013, the Division filed a Motion for a Procedural Conference and indicated that copies of the Notice; documents related to the representation of the ERC Entities; and the Sixth Procedural Order scheduling the matter for hearing in February 2014 had been e-mailed to Mr. Quinn.

The Division requested that certain time deadlines be established with respect to the future representation of the ERC Entities.

On October 25, 2013, a Consent Order was entered against Respondents Brian and Cheryl Buckley in Decision No. 74147.

On November 1, 2013, Mr. Thrasher filed a Motion to Withdraw as Counsel of Record for the ERC Entities due to the change in ownership and as discussed at the October 23, 2013, hearing.

On November 19, 2013, by Procedural Order, Mr. Thrasher's Motion to Withdraw was granted conditioned upon the filing of a complete copy of the final Purchase Contract. Additionally, it was ordered that if the ERC Entities were going to participate further in this matter and contest the Notice, that a lawful representative or counsel for the ERC Entities must enter an appearance.

On December 6, 2013, an Arizona attorney filed a letter on behalf of the ERC Entities, stating that no appearance would be entered on behalf of the ERC Entities and that the current manager of the ERC Entities "was not in control of the entities during the relevant time frame." Further, the attorney stated that a resolution of the matter was being sought with the Commission.

At a December 12, 2013, procedural conference, the Division, TCC, TCBD, and Mogler were represented by counsel. No appearance was made on behalf of C&D or any other remaining Respondents. The Purchase Contract for the ERC Entities was further discussed, and Mr. Thrasher, as counsel for TCC, TCBD, and Mogler, indicated that he would be seeking discovery with respect to the Division investigator's notes, logs, and reports beyond the documentary material previously disclosed by the Division. Mr. Thrasher agreed that he would pursue the material he required by filing for a subpoena by December 17, 2013; the Division's counsel agreed to file a response by January 6, 2014.

On December 17, 2013, counsel for TCC, TCBD, and Mogler filed an "Application for Issuance of a Subpoena for Documents to Arizona Corporation Securities Division" ("Application"). Therein he requested "an unredacted copy of the investigative file." The only documents excluded from the Application were those documents previously provided to the Respondents in the Division's List of Exhibits and Witnesses pursuant to stipulation on August 26, 2013.[6]

[6] In the exchange, the Division provided Respondents with in excess of 250 Exhibits.

On December 31, 2013, the Division filed its Response in Opposition ("Response") to the Application by TCC, TCBD, and Mogler. The Division stated that on October 31, 2013, it had advised Respondents' counsel of the procedures necessary to obtain discovery from the Division, and that Respondents' counsel had delayed until December 17, 2013, to file their request in this proceeding. The Division stated that this action is governed by the Commission's Rules, A.A.C. R14-3-101 et seq., and the Administrative Procedures Act, A.R.S. §§ 41-1001 et seq. ("APA"). The Division argued that the Respondents had been provided with thousands of documents along with its list of witnesses prior to the commencement of the hearing and that Respondents' Application complied with neither the Commission's Rules nor the APA. The Division argued that the Application was overbroad, unduly burdensome, and untimely and that it constituted a "stall tactic" after considering the timeline in the proceeding.

Respondents TCC, TCBD, and Mogler did not file a Reply to the Response.

On January 16, 2014, by Procedural Order, the Application was denied because it was not timely, and the Respondents had not shown a reasonable or substantial need for the documents and had failed to show why the confidentiality of the documents should not be maintained pursuant to A.R.S. § 44-2042.

On January 22, 2014, counsel for C&D filed a Motion to Withdraw, citing A.A.C. R14-3-104(E), which permits the withdrawal of an attorney upon good cause. Counsel cited Ethical Rule ("ER") 1.16 of Rule 42 of the Rules of the Arizona Supreme Court, which governs the termination of representation, and stated that "C&D ha[d] failed to substantially fulfill its obligations" by failing to make payments for its defense in this complex proceeding, which was placing an unreasonable financial burden on counsel, and that C&D had been warned. Counsel further represented that C&D had been served with a copy of the motion and had been advised when the proceeding was to resume.

A Motion to Continue the February 3, 2014, hearing was also filed on January 22, 2014, by counsel for TCC, TCBD, and Mogler, requesting a 30- to 45-day continuance for the remaining portion of the proceeding due to a conflict which had arisen with a criminal proceeding in the Maricopa County Superior Court.

On January 24, 2014, the Division filed responses to both of the pending motions. With respect to the Motion to Withdraw, the Division argued that the motion was not timely since apparently nonpayment had been an issue for at least nine months, and that C&D should not be granted any further continuances whether it was represented or not. With respect to the Motion to Continue, the Division argued that the proceeding had been continued previously due to a conflict of interest of counsel, that a hearing with an expected duration of three weeks could not easily be rescheduled, and that a further continuation could lead to a further fragmentation of the proceeding.

On January 28, 2014, by Procedural Order, the Motion to Withdraw by counsel for C&D was granted, and a brief continuance, to February 18, 2014, was granted.

On January 31, 2014, Mr. Thrasher filed a purported final Purchase Contract for the ERC Entities, to comply with the Commission's Seventh Procedural Order. In addition, Mr. Thrasher filed a Notice to Withdraw [sic] ("Notice of Withdrawal") with respect to his remaining clients in the proceeding—Respondents TCC, TCBD, and Mogler (collectively "Tri-Core Respondents")—for a "conflict of interests." He provided Mogler's address, and the pleading was also signed by Mogler, but the nature of the "conflict" was not explained.

On February 3, 2014, the Division filed its response to Mr. Thrasher's Notice of Withdrawal questioning the timing of his filing and whether it would "prejudice the judicial process and delay the hearing." The Division argued that the Notice of Withdrawal should be denied if it delayed the resumption of the hearing in any way, and that the Tri-Core Respondents should not be allowed to continue any of the scheduled hearing dates whether represented or not.

On February 6, 2014, Mogler, on behalf of the Tri-Core Respondents, filed a Motion to Continue the February 18, 2014, hearing for a period of 45 days. Mogler stated that he was requesting a short delay after the Division concluded its case to prepare the Tri-Core Respondents' defense against the Division's allegations.

On February 7, 2014, by Procedural Order, Mr. Thrasher's Motion to Withdraw as Counsel of Record for the ERC Entities was granted unconditionally, and it was determined that his Notice of Withdrawal regarding the Tri-Core Respondents, and Mogler's Motion to Continue, required further

discussion to establish good cause. A procedural conference was ordered to convene on February 13, 2014.

On February 13, 2014, Mr. Thrasher filed a Reply to the Division's Response to his Notice of Withdrawal, setting forth more fully his reasons for requesting permission to withdraw from his representation of the Tri-Core Respondents, citing ER 1.7 with respect to the possible conflicts.

At the February 13, 2014, procedural conference, the Division appeared through counsel, and Mr. Thrasher and Mr. Mogler appeared. Mr. Thrasher explained that he had been in contact with both independent counsel and the ethics counsel for the Arizona State Bar to discuss the conflict issues which had arisen for him and his inability to secure the signatures of the other three members of Mr. Mogler's two limited liability companies on a Joint Representation Agreement in order to comply with ER 1.7(b) in the event future issues regarding a conflict of interests arose. Mr. Thrasher stated that he had made repeated attempts to secure these signatures, but that the other members of the two limited liability companies had failed to respond to his requests, which led to the filing of his Notice of Withdrawal.

With respect to the Motion to Continue, Mogler made clear that he did not wish to delay the Division's presentation of its case, but was requesting a brief continuance in order for him to prepare the Tri-Core Respondents' defense to the Division's evidence.

On February 14, 2014, by Procedural Order, Mr. Thrasher's Notice of Withdrawal as counsel for the Tri-Core Respondents was granted, and an extension of time was allowed for the Tri-Core Respondents to prepare their defense.

The hearing reconvened on February 18, 2014, and the Division completed the presentation of its case in chief on February 20, 2014.

By Procedural Order dated February 21, 2014, the proceeding was scheduled to resume on May 6, 2014.

On March 18, 2014, the Division filed a Motion to Compel the Tri-Core Respondents to submit an amended list of witnesses and exhibits within two weeks of the conclusion of the Division's case in chief, as agreed by Mogler at that time.

On March 26, 2014, Mogler filed an updated list of expected witnesses but failed to specify if any of these witnesses would be called as an expert witness. Additionally, Mogler failed to provide any updated copies of exhibits which he planned to introduce in the proceeding.

On April 10, 2014, by Procedural Order, the Tri-Core Respondents were ordered to file, by April 18, 2014, notice if any of their witnesses were to be called as experts and ordered to submit copies of their exhibits to the Division.

On April 17, 2014, the Mogler Entitles filed a Motion to Dismiss the above-captioned proceeding, arguing that the Commission lacked legal authority to pursue its action herein under the Arizona Constitution.

On April 22, 2014, the Division filed its response to the Motion to Dismiss, stating that it was untimely, and that the Arizona Supreme Court has held that the express powers which have been granted to the Commission under the Arizona Constitution "are merely the minimum and that under the constitution, the Commission may exercise all powers which may be necessary or essential in connection with the performance of its duties."[7] The Division further argued that the Arizona legislature expanded the powers of the Commission with the passage of the Arizona Securities Act ("Securities Act") which authorizes the Commission to regulate the sale of securities.

On April 25, 2014, by Procedural Order, the Respondents' Motion to Dismiss was denied.

The hearing reconvened on May 6, 2014, and concluded on May 8, 2014.

Subsequent to the conclusion of the hearing, an issue arose concerning whether the Division had appropriately redacted confidential information contained in certain of the Division's exhibits or documents which had been admitted into evidence.

On May 30, 2014, by Procedural Order, the Division was directed to examine any exhibits or documents admitted as evidence to ensure that any confidential information had been appropriately redacted.

On June 12, 2014, the Division filed its Notice of Compliance with Procedural Order indicating that the exhibits admitted at hearing had been redacted of all confidential information as required by

[7] *See Garvey v. Trew*, 64 Ariz. 342, 346, 170 P. 2d 845, 848 (1946).

law.

On July 1, 2014 the Division filed its Post-hearing Brief.

On July 3, 2014, the Tri-Core Respondents filed their Post-Hearing Brief.

On July 25, 2014, the Division filed its Reply Brief.

II. Brief Overview

This proceeding involves the offer and sale of unregistered securities in the form of notes that involved an investment in either Mexican land or recycling facilities. In several Private Placement Offerings, Respondents TCMLD, TCC, TCBD, and Mogler offered and sold investments in Mexican land in the form of Promissory Notes. Similarly, Respondents C&D, ERCC, and Mogler offered and sold, and ERCI offered, investments in recycling centers in the form of Promissory Notes. All of the Promissory Notes at issue are securities for the purposes of Securities Act registration requirements. None of the Promissory Notes were registered with the Commission, and none of the Respondents were registered as broker/dealers or salesmen. Respondents argued that the Promissory Notes were exempt from registration requirements. However, we find that the Respondents did not meet their burden of demonstrating that they complied with either the safe harbor provisions of Rule 506 of Regulation D of the Securities Act of 1933 or the requirements of Arizona law to qualify as exempt from registration. Thus, we conclude that the Respondents violated the Securities Act's registration requirements in connection with each offering.

In addition, in the course of the offerings and sales of the securities described herein, Respondents made a number of misstatements and omissions of material facts that a reasonable investor would want to know when making an investment. As a result, we find that the Respondents committed multiple violations of the anti-fraud provisions of the Securities Act.

III. Testimony

Through the testimony of its investigator and several investors, the Division introduced the investments into evidence.

A. TCMLD Investment – Lot 5

TCMLD is a manager-managed limited liability company organized in Arizona in May 2007.

Since inception, James Lex Stevens ("Stevens") has been TCMLD's manager and member, with members Sylvia Torres Macker and Mogler.[8]

TCMLD issued a private placement memorandum ("PPM") dated May 1, 2007, offering notes to investors at an 80-percent rate of return, compounded annually, with a maturity date for payment of both interest and principal 24 months from the date of commencement of each note.[9] The total offering was not to exceed $3,500,000. At all times relevant to this proceeding, TCMLD was not registered with the Commission as a securities dealer, nor was the offering for registered securities.[10]

In addition to the PPM, investors executed and received a subscription agreement and note issued by TCMLD (hereinafter collectively "TCMLD investment documents"). The TCMLD investment documents stated that "use of the proceeds is to purchase a water front subdivision in San Luis Rio Colorado, Sonora, Mexico." Investors were advised that investment property was Mexican real estate known as "lot 5".[11] According to Stevens, Lot 5 is made up of five separate parcels of land, Parcels 1-5, and is roughly 250 acres of beachfront land.[12]

TCBD is an Arizona limited liability company organized in January 2006 as a member-managed company.[13] In November 2007, TCBD was converted to a manager-managed company, with Mogler as the managing member.[14]

Pursuant to an agreement between TCMLD and TCBD, TCBD acted as agent for TCMLD for the TCMLD offering, raising capital and holding and distributing investor funds.[15] Mogler signed the agreement between TCMLD and TCBD on behalf of TCBD and also signed the TCMLD investment documents as "Principal" of TCMLD.[16]

The TCMLD investment documents instructed investors to forward their investment documents to TCMLD, and to wire or make their checks payable to TCBD, both at the same address in Scottsdale,

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[8] Hearing Transcript ("HT") at 36.
[9] Exs. S-52 - S-94, S-104 – S-105, S-107 – S-109, S-111 – S-113, S-253.
[10] Ex S-1(b).
[11] Exs. S-104, S-109, S-122; HT at 479 – 480; 690- 691, 825.
[12] HT at 783-784 and 798-799.
[13] Ex. S-4(a).
[14] Ex S-4(b).
[15] Ex S-124.
[16] *See e.g.* S-107 at ACC000187, S-124 at TRI_MDL000121.

Arizona.[17] TCBD received all investor funds in a "clearing account."[18] During the relevant period, Mogler was a signatory on TCBD bank accounts, and received the bank statements at his home address.

TCBD has not been registered with the Commission as a securities dealer or salesman during the relevant time period.[19]

According to documents produced by Mogler, TCMLD had over 80 investors in Lot 5, and raised a total of $1,300,000.[20] Over 50 of those investors were offered and sold the investments in or from Arizona, totaling $1,165,000 of the total invested.[21] Out-of-state residents that invested in TCMLD either returned their investment documents and funds to Arizona, were solicited when in Arizona, or were solicited through the mail or email from Arizona.[22] Note holders had no managerial rights or powers.[23]

Despite the fact that all notes with TCMLD have passed the two-year term, there is no evidence that investors have been repaid at all.[24] TCMLD never purchased Lot 5 or any other Mexican property with investor funds.[25]

Stevens testified that investor funds have been completely spent—TCBD was paid approximately $925,000 in upfront consulting fees; $150,000 was paid as a deposit for a contract to purchase Lot 5, the rights under which have been in dispute in Mexico since 2007; and funds have gone to attorneys' fees related to title issues.[26] Stevens further testified that even if title issues were resolved in favor of TCMLD, TCMLD had no additional funds to pay the remaining balance of the $1.7 million purchase price for Lot 5.[27]

The PPM for the TCMLD offering stated that Stevens was the "Principal" with a long successful history in real estate, and was one of the managers upon which the success of the TCMLD

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[17] See e.g. EXs S-107 at ACC00179, S-119.
[18] HT at 839.
[19] Ex S-1(c).
[20] Exs S-33, S-50, S-95 – S-98, S-114; HT Vol 1 at 68 – 71, and at 109.
[21] EXs S-33, S-50 – S-105, S-107 – S-109, S-111 – S-116, S-219, S-253; HT Vol 1 at 41- 47, and 66 0 109; HT Vol VII at 839.
[22] HT at 49, 462 – 465, 468-469.
[23] See e.g. Ex S-107 at ACC000168.
[24] HT at 697, 848 – 849.
[25] HT at 132; 466.697, and 698.
[26] HT at 698; 807, 808, 814, 821, 822, 826, 828 - 830, 839 – 840, and 843.
[27] HT 828 – 830, 839-840, 843.

depended.[28] The TCMLD investment documents did not disclose that Stevens had multiple federal tax liens recorded against him in Florida, totaling over $100,000; nor was the existence of the tax liens disclosed to investors in any other way.[29]

The TCMLD investment documents also stated that the success of TCMLD was "dependent on the services and expertise of existing management," listed Mogler as a member of management, and stated that Mogler "has an impressive resume at Arizona State University where he holds a Bachelor of Science degree with a major in marketing and a minor in psychology."[30] However, Mogler does not have a degree from Arizona State University, and only attended half time for a few semesters.[31]

The PPM also represented to investors that the notes were "Secured Promissory Notes" and "secured by the land Tri-Core Mexico Land Development, LLC purchases."[32] At least three investors were told that the investment was "safe" due to the security that was pledged.[33] It was not disclosed to investors that an American entity cannot directly own the ocean-front Mexican property at issue as it must be held in a bank trust or a Mexican corporation. Investors were advised before investing that TCMLD had entered into a contract to purchase Lot 5, but in fact, TCMLD has never purchased Lot 5, or any other Mexican real estate with investor funds, and has not securitized its investors in any way.[34]

Stevens testified that the purchaser on the contract to purchase Lot 5 was Sylvia Torres, not TCMLD, and that the legality of that contract has been at issue since 2007 and is purportedly being litigated in the Mexican courts.[35]

TCMLD had knowledge of the title issue with Lot 5 in 2007, but solicited investors for Lot 5 in 2008 with no mention of the title issue in the offering materials. In addition, it was not disclosed to investors that one of the five parcels comprising Lot 5 had been promised to TCBD as compensation.[36]

The TCMLD PPM advised investors: "This Offering is being sold by the officers and directors of the Company [TCMLD], who will not receive any compensation for their efforts. No sales fees or

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[28] *See* Ex S-107 at ACC000160.
[29] Exs S-244-245; HT at 55-56; Ex S-53 – S-94, S-104 – S-105, S-107 – S-109, S-111, S-253; HT at 465 – 466.
[30] See e.g. S-128 at TRI_C007637.
[31] Ex S-218; HT at 51-55.
[32] *See e.g.* Ex S-107 at ACC000154, 000164; HT at 692.
[33] Exs S-104, S-109 at ACC010581; HT at 480-481,688- 690, 692.
[34] Ex S-104 at ACC004740, S-109 at ACC010549; HT at 132; 479-480; 466; 696-697; 833, 835-837.
[35] HT at 807-808, 814, 821-822, 826.
[36] HT at 804 and 845.

commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive commissions up to ten percent (10%) of the price of the Notes sold."[37] However, investors were solicited by and sold investments in TCMLD through individuals that were not officers or directors of TCMLD, who were not members of the National Association of Securities Dealers ("NASD")(now the Financial Industry Regulatory Authority ("FINRA")) or registered as dealers or salesmen in Arizona, and who received commissions.[38] One of these unregistered salesmen, Brian Buckley, received sales fees/commissions for over 30 investors he solicited to invest in the TCMLD offering.[39]

B. TCC 2/08 Investment – Lot 5

TCC is a limited liability company organized in Arizona in August 2007. Originally organized as a member-managed company, TCC was changed to a manager-managed company in October 2007, with Mogler as the manager. During all relevant periods, Mogler was a signatory on TCC bank accounts.[40]

TCC issued a PPM dated February 1, 2008, offering notes to investors at an 80-percent rate of return, compounded annually, with a maturity date for payment of both interest and principal 24 months from the date of commencement of each note. The total offering was not to exceed $3,500,000.[41]

During all relevant periods, TCC was not registered with the Commission as a dealer, nor was the offering for registered securities.[42]

In addition to the PPM, TCC investors received a subscription agreement and note issued by TCC as well as TCC's business plan (hereinafter collectively "TCC 2/08 investment documents"). Mogler was one of the signatories for TCC on the TCC 2/08 investment documents.[43] The TCC 2/08 investment documents stated that "use of the proceeds is to purchase a water front subdivision in San

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[37] See, e.g., Ex S-107 at ACC000165.
[38] Ex S-1(j), S-250; HT at 533-534, 536-537, 537 – 538.
[39] Exs S-1(j), S-125, S-250.
[40] EXs S-2(a) and S-13 at ACC006340-6351.
[41] Ex S-128 - S-129, S-132 – S-136.
[42] Ex S-1(a).
[43] Exs S-128 – S-129, S-132 – S-136.

Luis Rio Colorado, Sonora, Mexico."[44] Investors were advised in writing and orally that the investment property was Mexican real estate known as "Lot 5".[45]

The Lot 5 that is referenced in the TCC 2/08 investment documents has the same property description as provided to investors in the TCMLD investment.[46]

Documents provided by TCC indicate that at least 7 investors invested in the TCC 2/08 investment, with $335,000 raised from investors in or from Arizona. Out-of-state residents who invested in the 2/08 investment either returned their investment documents and funds to Arizona or were solicited by phone or email from Arizona. Note holders had no managerial rights or powers. There is no evidence that TCC 2/08 investors have been repaid in any way, despite the passing of the two-year term of the notes.[47]

Due to title issues with Lot 5, the property has not been purchased and TCC's representative testified at hearing that he did not know what had happened to TCC 2/08 investor funds.[48]

The TCC 2/08 investment documents advised investors that it was offering "secured Promissory Notes" and that the "Notes being offered by the Company in this Private Placement Offering are secured by the land Tri-Core Companies, LLC purchases"; and the business plan stated that "[t]he Company [TCC] has acquired the 250-acre plus Lot 5 land parcel . . ."[49]

TCC did not disclose that it could never directly own the ocean-front Mexican property at issue, as it must be held in a bank trust or by a Mexican corporation.[50] Although Lot 5 referenced in the TCC 2/08 investment documents has the same property description as provided in the TCMLD investment documents, the TCMLD offering pledging the same security was not disclosed to TCC investors.[51] Title to Lot 5 has never been held by TCC, and investors have not received any proof of ownership or security for their investments.[52] Although investors were advised their funds would be used to purchase

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[44] *See* e.g. S-128 at TRI_C007636.
[45] Exs. S-128 – S-129, S-132 – S-136; HT at 493 – 495. The TCC business plan provided to investors states, "The Company [TCC] has acquired the 250-acre plus Lot 5 land parcel . . ."
[46] HT at 234 –235.
[47] HT at 848 and 516.
[48] HT at 1062 – 1063.
[49] *See e.g.* Ex S-128 at TRI_C007631 and TRI_C007641, 7677.
[50] Ex R-14; HT at 833 – 835; 898 – 900, 990.
[51] Exs S-128 – S-129, S-132 – S-136; HT at 134 – 135, 497, 509-510.
[52] HT at 132,134-135, 497, 509 – 510.

Lot 5, TCC's representative admitted that Lot 5 has not been purchased due to title issues, and thus, investor funds were not used for that land purchase.[53] The TCC 2/08 investment documents also stated that the success of TCC was "dependent on the services and expertise of existing management," and listed Mogler as a member of management with "an impressive resume at Arizona State University where he holds a Bachelor of Science degree with a major in marketing and a minor in psychology," although Mogler has never earned a degree from Arizona State University.[54] The TCC 2/08 investment PPM advised investors that the investment was "being sold by the officers and directors of the Company [TCC], who will not receive any compensation for their efforts. No sales fees or commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive commissions up to ten percent (10%) of the price of the Notes sold."[55] In fact, Brian Buckley, who also received sales fees/commissions for numerous TCMLD Lot 5 investors, received sales fees/commissions for all but one of the TCC 2/08 Lot 5 investors at issue.[56] Mr. Buckley was not an officer or director of TCC, a member of NASD (FINRA), or registered as a dealer or salesman in Arizona.[57] TCC's representative admitted at hearing that he had no idea whether the salespeople selling the TCC investments were registered with FINRA or in Arizona.[58]

C. TCC 3/08 Investment – Lot 47

TCC issued another PPM dated March 1, 2008, offering notes to investors at a 60-percent rate of return, compounded annually, with a maturity date for payment of both interest and principal 24 months from the date of the commencement of each note. The total offering was not to exceed $4,500,000. TCC was not registered with the Commission as a dealer, nor was this offering for registered securities.[59]

In addition to the PPM, investors executed and received a subscription agreement and note issued by TCC, and were provided with TCC's business plan (hereinafter collectively "TCC 3/08

[53] HT at 1062 – 1063.
[54] See e.g. Ex S-128 at TRI_C007637; HT at 51 – 55.
[55] *See e.g.* S-218 at TRI_C007642.
[56] Exs S-150, S-250.
[57] Exs S-1(j), S-150, S-250; HT at 533 – 534, 526 -538.
[58] Ex S-1(a).
[59] Ex S-1(a).

investment documents").[60] Mogler was one of the signatories for TCC on the TCC 3/08 investment documents. The TCC 3/08 investment documents stated that "use of the proceeds is to purchase and develop a water front parcel in San Luis Rio Colorado, Sonora, Mexico as described herein." Investors were advised both orally and in writing in the accompanying business plan that investment property was Mexican real estate known as "Lot 47" or "Relaxante."[61]

TCC's documents indicate that its 3/08 Lot 47 investment had over 30 investors and raised a total of $1,400,000.[62] Over 25 of those investors were offered and sold the investments in or from Arizona, totaling approximately $1,158,000 of the total invested.[63] Out-of-state residents that invested in the TCC 3/08 investment either returned their investment documents and funds to Arizona; traveled to Arizona and were directly solicited in Arizona; or were solicited by phone, mail, or email from Arizona.[64] Note holders had no managerial rights or powers.[65] There is no evidence that TCC 3/08 investors have been repaid in any way, even though the two-year notes were issued in 2008, 2009, and 2010.

TCC's representative testified that TCC paid TCBD $1,500,000 for Lot 47, but could not explain where the extra funds came from given that TCC raised only $1,400,000 from investors and paid at least $33,000 in commissions and unknown amounts for marketing and administrative expenses from Lot 47 investor funds.[66]

The TCC 3/08 investment documents advised investors that TCC was offering "secured Promissory Notes," stated that "[t]he Notes being offered by the Company in this Private Placement Offering are secured by the land Tri-Core Companies LLC purchases," and identified the property in the accompanying business plan as "Lot 47" or "Relaxante."[67] Mogler and others represented in public broadcasts during the time the TCC 3/08 investment was offered that investments in Mexican land

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[60] Exs S-141 – S-151, S-153 – S-166, S-172, S-221.
[61] Exs S-141 – S-151, S-153 – S-166, S-172, S-221; *see e.g.* S-149 at TRI_C005965 and TRI_C006009; HT Vol V at 559 – 560, 572 – 573, 638.
[62] Exs S-44, S-141 – S-151, S-153 – S-166, S-172, S-221: HT Vol L at 152 – 153, 154 – 156.
[63] Exs S-141 – S-151, S-153 – S-166, S-172, S-221; HT Vol L at 152 – 153, 154 – 156.
[64] Exs S-170 – A-171; HT Vol I at 170 – 171, 172 – 173, 175, 179m 181 – 183, 184 – 185: HT at 555 – 556, 560, 570 – 571, 573.
[65] See e.g. Ex S-149 at TRI_C005975.
[66] HT at 920, 1003, 1022 – 1023; Exs S-44, S-182 – S-183, S-221, S-250; HT at 150 – 151; 533 – 534, 536-538, 546; 1016-1017, 1021-1022.
[67] *See e.g.* S-149 at TRI_C005971, 6009-10.

were "safe" because they were secured by land and that investors were in a "first lien position."[68]

Investors were not informed that Mexican laws prohibited TCC from holding title to Lot 47. TCC representatives admitted that TCC 3/08 investment documents advised investors that TCC would own Lot 47 even though it was not legally permitted in Mexico.[69] Investors have not been provided proof that TCC purchased Lot 47, or proof that they hold any security in Lot 47.[70]

Mogler produced the only title document concerning Lot 47, which was a Sales Agreement for Lot 47 with the purchaser identified as "Phoenix Premium Developers, Sociedad de Responsabilidad Limitada De Capital Variable."[71] TCC's representative confirmed at hearing that Lot 47 is held by Phoenix Premium Developers, an S. de R.L. (Mexican corporation), and that the land could not be held in fee simple title by an American entity.[72] TCC's representative also testified that there is a mechanism in Mexico to secure the TCC 3/08 investors with Lot 47, but that TCC 3/08 investors are not securitized by Lot 47 because TCC does not have the approximately $25,000 it would cost.[73]

The TCC 3/08 investment documents stated that the success of TCC was "dependent on the services and expertise of existing management." The PPM listed Mogler as a member of management, and boasted that Mogler "has an impressive resume at Arizona State University where he holds a Bachelor of Science degree with a major in marketing and a minor in psychology." In fact, Mogler has never earned a degree from Arizona State University, and only attended, at most, half time for a few semesters.[74]

The TCC 3/08 investment PPM advised investors that the investment was "being sold by the officers and directors of the Company, who will not receive any compensation for their efforts. No sales fees or commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive commissions up to ten percent (10%) of the

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[68] Exs S-21, S-23, S-26, S-227, S-229, S-255(a) & (b); HT at 207 – 208, 209-212, 224 – 229, 231 – 232:HT Vol IV at 408 – 413, 416 – 424, 426 – 438: HT Vol V at 535 – 536.
[69] HT at 1004 – 1005.
[70] Ex S-45(a); HT at 561, 574 – 575, 629; HT at 186 – 187; HT Vol V at 561, 575, 639.
[71] Ex S-45(a), S-45 (b); HT at 159 – 165.
[72] Ex R-14; HT at 900 – 907, 928, 990.
[73] HT at 1008 – 1011, 1035.
[74] *See e.g.* Ex S-149 at TRI_C005966; Ex S-218; HT at 51 -55.

price of the Notes sold."[75] Brian Buckley received sales fees/commissions for the majority of the TCC 3/08 Lot 47 investors at issue, totaling approximately $30,000.[76] Mr. Buckley was not an officer or director of TCC, a member of NASD (FINRA), or registered as a dealer or salesman in Arizona.[77] Kathleen Randolph also received sales fee/commissions for bringing in at least one Lot 47 investor; she was not an officer or director of TCC, a member of NASD (FINRA) or registered as a dealer or salesman in Arizona.[78]

An accounting expert retained by Mogler, and who relied on information from Mogler, prepared a report that indicated that not only Mr. Buckley and Ms. Randolph received sales fees/commissions, but Casimer Polanchek and his entities received approximately hundreds of thousands of dollars from investor funds for referral fees between 2009 and 2011.[79]

Between 2009 and 2010, Mogler used approximately $345,000 of investor funds, including investor funds from the TCC 3/08 offering, for personal use that was not disclosed to investors.[80]

D. TCC 6/10 Investment – Mexican Land

TCC issued a PPM dated June 1, 2010, offering notes to investors at a 40-percent rate of return, compounded annually, with a maturity date for payment of both interest and principal 24 months from the date of commencement of each note. The total offering was not to exceed $5,500,000. Neither TCC nor this offering was registered with the Commission.[81] In addition to the PPM, investors executed and received a subscription agreement and note issued by TCC, and were provided with TCC's business plan ("TCC 6/10 investment documents").[82] Mogler was a signatory for TCC on the TCC 6/10 investment documents.[83] The TCC 6/10 investment documents stated that "use of the proceeds is to purchase parcels of land along the Sonoran Coast of Mexico."[84] The subject parcel(s) were not specifically identified to investors in the investment documents at the time of investing; TCC's

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[75] *See e.g.* Ex S-149 at TRI_C005972.
[76] Exs S-44, S-125, S-221. S-250.
[77] Exs S-1(j), S-150, S-250; HT at 533- 534, 536 – 537, 537 – 538.
[78] Exs S-1(n), S-182, S-183; HT at 546.
[79] Exs S-256 at 44-45, S-258 – S-259 at fn 15 & Exhibit 1-M; HT at 1073 – 1074.
[80] Exs S-256 at 45-47, 53-54, S-258 – S-259.
[81] Ex S-1(a).
[82] Exs S-184 – S-189, S-236.
[83] Exs S-184 – S-189, S-236
[84] *See e.g.* Ex S-187 at TRI_C003273.

representative identified the subject property for the first time as "Lot 3." [85]

TCC's investor list for the 6/10 offering shows approximately $1,285,000 raised from over 40 investors.[86] The list omitted at least two investors that invested an additional $200,000.[87] Thus, the total investor funds raised for the TCC 6/10 offering was at least $1.485 million.[88] At least 7 investors were offered and sold the investments in or from Arizona, totaling $370,000 of the total invested.[89] Note holders had no managerial rights or powers.[90]

TCC claims that Lot 3 was purchased with investor funds from the TCC 6/10 investment.[91] The TCC 6/10 investment documents state that the cost of the land purchase is $4.495 million, and TCC's representative testified that the purchase price for Lot 3 was $3.6 million. It is unclear how investor funds totaling less than $1.5 million funded this land purchase.[92] TCC was unable to produce documents at hearing to verify the purchase of Lot 3, and TCC's representative was unable to give any reason why the land had not been transferred to TCC and was still being held by a third party.[93] There is no evidence that TCC 6/10 investors have been repaid in any way, despite the maturation of the two-year notes.[94]

The TCC 6/10 investment documents advised investors that it was offering "Secured Promissory Notes" and that "[t]he Notes being offered by the Company in this Private Placement Offering are secured by the land Tri-Core Companies LLC purchases."[95] Investors were orally advised that their investment would be securitized by Mexican land.[96] Mogler represented in a public broadcast during the time the TCC 6/10 investment was offered that investments in Mexican land were "safe" because they are secured by land.[97] Investors have never been provided any proof that their investment funds were used to purchase land in Mexico, and TCC failed to produce any title documents at

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[85] HT at 944.
[86] Ex S-47; HT at 237 – 238.
[87] Ex S-47, S-189, S-222, S-236; HT at 239 – 241.
[88] Division Opening Brief at 16.
[89] Exs S-184 – S-189, S-222, S-236; HT at 234 – 235, 237 – 238, 243 – 244.
[90] See e.g. Ex S-187 at TRI_C003283.
[91] HT at 1030 – 1031.
[92] Division Initial Brief at 16.
[93] HT at 1031 and 1035.
[94] HT at 590 – 591; and 682.
[95] *See e.g.* Ex S-187 at Tri_C 003269-3279.
[96] See e.g. HT at 676 – 677.
[97] Exs S-21, S-23, S-26, S-227, S-255(b); HT at 207 – 208, 209 – 212, 224 – 229; 408 – 413, 426 – 438; 535 – 536.

hearing.[98] TCC's representative testified that Lot 3 "is in the process of being titled."[99] As of the date of the hearing, Sylvia Torres owned Lot 3, not TCC, and TCC's representative could not explain why title had not been transferred from Ms. Torres.[100]

TCC's representative testified that due to Mexican law, title to a Mexican parcel such as Lot 3 cannot be held in fee simple by TCC and has to be owned by a Mexican corporation or a Mexican national.[101] TCC's attorney also advised TCC that Mexican land can be owned by a Mexican bank/land trust.[102]

Investors have not been provided proof that their investment is securitized with any Mexican land. TCC's representative testified that securitizing investors with property in Mexico is costly, and that TCC does not have cash to securitize investors.[103]

TCC's 6/10 investment documents state that the success of TCC was "dependent on the services and expertise of existing management." The PPM listed Mogler as a member of management and stated that Mogler "has an impressive resume at Arizona State University where he holds a Bachelor of Science degree with a major in marketing and a minor in psychology."[104] Mogler has never earned a degree from Arizona State University, and only attended part-time for a few semesters.[105]

TCC's 6/10 investment PPM advised investors that the investment was "being sold by the officers and directors of the Company, who will not receive any compensation for their efforts. No sales fees or commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive commissions up to ten percent (10%) of the price of the Notes sold."[106] Brian Buckley received sales fees/commissions for numerous TCC 6/10 investors, but was not an officer or director of TCC, a member of NASD (FINRA) or registered as a

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[98] HT at 590; 681; and 1035.
[99] HT at 944.
[100] HT at 1031.
[101] HT at 900 & 990.
[102] Ex R-14.
[103] HT at 1009 – 1011; and 1104.
[104] *See e.g.* Ex S-187 at TRI_C003274.
[105] Ex S-218; HT at 51-55.
[106] *See e.g.* Ex S-187 at TRI_C003280

dealer or salesman in Arizona.[107]

Mogler's accounting expert prepared a report analyzing the use of investor funds from 2009-2011.[108] Investors invested in the 6/10 offering in 2010 and 2011.[109] The accounting expert testified that Mogler identified relevant investors for the report. Mr. Buckley received sales fees/commissions for bringing in investors, and Casimer Polanchek and his entities received "hundreds of thousands of dollars" from investor funds for referral fees between 2009 and 2011.[110] Between 2010 and 2011, Mogler used approximately $445,000 of investor funds, which includes investor funds form the TCC 6/10 offering, for personal use that was not disclosed.[111]

E. ERCC Investment - Recycling

ERCC issued a PPM dated August 8, 2011, offering notes to investors at a 24-percent rate of return with a maturity date for payment of principal 24 months from the date of commencement of each note. Interest was deferred for 90 days, then added to the principal balance, and interest payments were to be paid on the combined amount starting the fourth month.[112] The total offering was not to exceed $1,500,000. In addition to the PPM, investors executed and received a subscription agreement and note issued by ERCC (hereinafter collectively "ERCC investment documents").[113]

The ERCC investment documents stated ERCC was a new division of "ERC," in the business of recycling, and that "use of the proceeds is to purchase compactor equipment to be installed at commercial locations ('SEE USE OF PROCEEDS')."[114] Mogler was a signatory, on behalf of ERCC, on the ERCC investment documents.[115] Neither ERCC nor the securities for the ERCC offering were registered with the Commission.[116]

During the relevant time period, ERCC was a manager-managed limited liability company, organized in Arizona in August 2011. During the relevant period, Mogler was the manager of ERCC,

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[107] Exs S-47, S-222, S-250, S-1 (j); HT Vol V at 533 – 534, 536 – 538.
[108] Exs S-256 at 10-12, 14-17, 53-54, S-258 – S-259.
[109] Exs S-47, S-222.
[110] Exs S-257 at 44-45, S-258 – S259 at fn 15 & exhibit 1-M; HT at 1073 – 1074.
[111] Exs S-256 at 45-47, 53-54, S-258 – S-259.
[112] Exs S-190 – S-196, S-198 – S-201, S-207, S-235.
[113] *Id.*
[114] See e.g. Ex S-191 at ERCC_000309.
[115] Exs S-194 – S-196, S-198 – S-199, S-207.
[116] Ex S-1(d).

and Jim Hinkeldey was a member.[117] Mogler was the sole signatory on the ERCC bank accounts during the relevant time period.[118]

ERCC's investor list for the offering listed approximately 30 investors who invested a total of approximately $1.214 million.[119] The list omitted at least three investors who invested an additional $455,000.[120] The total investor funds for the ERCC offering were at least $1.669 million, which is greater than the maximum offering amount represented to investors. Ten of the investors were offered and sold the investments in or from Arizona in 2011, totaling $880,000 of the total.[121] Note holders had no managerial rights or powers.[122]

Mr. Hinkeldey testified that ERCC has been successful, but could not explain why the majority of investors had not been repaid.[123] Investor payments totaling $47,477 were made to three investors in November 2012 and March 2013.[124]

Although the ERCC investment documents stated that ERCC was offering "secured Promissory Notes" and that the notes "will be secured by the equipment/compactors purchased,"[125] ERCC provided no proof of what happened with investor funds or that equipment was purchased with investor funds as promised. Investors have not been provided proof that equipment was purchased or with any mechanism to securitize their investments.[126]

At least one ERCC investor was issued a PPM issued by "ERC Compactors Nevada, LLC," identified as an Arizona limited liability company.[127] Mogler signed this investor's investment documents, including the promissory note, on behalf of "ERC Compactors Nevada, LLC"; however, no entity under the name of "ERC Compactors Nevada, LLC" exists or has existed in Arizona.[128]

The ERCC investment documents state that the success of ERCC was "dependent on the

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[117] Ex S-5(a).
[118] Ex S-13 at ACC006357-60.
[119] Ex S-28, S-32 at ACC004718, S-38; HT at 287 – 289, 293.
[120] Exs S-194 – S-196, S-298 – S-199, S-207; HT at 294 – 300.
[121] Exs S-190 – S-196, S-198 – S-2-1, S-207, S-223, S-235; HT at 294; HT at 604 – 606.
[122] See e.g. S-191 at ERCC_000318.
[123] HT at 1110 – 1111.
[124] Exs S-223, S-238, S-243; HT at 306 – 307, 310, 311 – 312.
[125] *See e.g.* S-191 at E\RCC_000305, 314.
[126] HT at 601.
[127] Exs S-38, S-200, S-235, S-238; HT at 301 – 305, 306 – 307.
[128] Exs S-235, S-239; HT at 306.

services and expertise of existing management." The PPM listed Mogler as a member of management and stated that Mogler "has an impressive resume at Arizona State University where he holds a Bachelor of Science degree with a major in marketing and a minor in psychology."[129] In fact, Mogler has never earned a degree from Arizona State University, and only attended, at most, half time for a few semesters.[130]

The ERCC investment documents advised investors that the investment was "being sold by the officers and directors of the Company, who will not receive any compensation for their efforts. No sales fees or commissions will be paid to such offers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive commissions up to ten percent (10%) of the price of the Notes sold."[131] Brian Buckley received commissions for numerous ERCC investors, but Mr. Buckley was not an officer or director or ERCC, a member of NASD (FINRA), or registered as a dealer or salesman in Arizona.[132]

In 2011, Mogler used approximately $180,000 of investor funds, including ERCC investor funds, for personal use that was not disclosed to investors.[133]

F. C&D Investment - Recycling

C&D issued a PPM dated October 1, 2010, offering notes to investors at a 24-percent rate of return with a maturity date for payment of principal 24 months from the date of commencement of each note. Interest was payable monthly.[134] The total offering was not to exceed $1,500,000. In addition to the PPM, investors executed and received a subscription agreement and note issued by C&D (hereinafter collectively "C&D investment documents").[135] The C&D investment documents stated that C&D had been formed in Nevada in 2000 and was in the business of rubbish and waste recycling and that "use of the proceeds is to create the company structure for the purchase and start-up requirements for a recycling center located in Apex, Las Vegas, Nevada. This covers such items as site

[129] See e.g. E-S-191 at ERC_C000310.
[130] Ex S-218; HT at 51-55.
[131] *See e.g.* Ex S-191 at ERC_C000315.
[132] Exs S-38, S-223, S-250, S-1(j); HT at 533 – 534, 536 – 537, 538.
[133] Exs S-256 at 45-47, 53-54, S-258 – S-259.
[134] Exs S-197, S-205, S-206, S-208, S-210 – S-213, S-234.
[135] Exs S-197, S-205, S-206, S-208, S-210 – S-213, S-234.

planning, legal, accounting, marketing plan, business plan, franchise development and all other steps needed in the formation of this company as described herein (see 'USE OF PROCEEDS')."[136] Mogler signed the C&D investment documents on behalf of Peter A. Salazar Jr. for C&D, pursuant to what was represented to investors as a limited power of attorney.[137] Investors were advised that TCBD was acting as agent for C&D and were directed to deliver their investment documents to TCBD in Scottsdale, Arizona, and to make their investment checks payable to TCBD.[138] During the relevant period, Mogler was a signatory on TCBD bank accounts.[139]

From 2009 to early 2012, which includes the dates when investments were made in the C&D investment, Peter A. Salazar was listed as on officer of C&D.[140] Mogler, on behalf of TCBD, executed a Consultant Agreement with C&D in October 2010.[141] The Consultant Agreement appointed TCBD to perform various tasks for C&D, including preparing the C&D investment documents and acting as investor liaison for a fee of $1,500,000.[142] C&D, the C&D offering, TCBD, and Mogler have never been registered with the Commission.[143]

TCBD, through Mogler, produced an investor list for the C&D investment showing a total of nearly $1.5 million raised, of which $735,000 was offered and sold in or from Arizona.[144] Mr. Hinkeldey testified that C&D was very successful,[145] but less than $200,000 in interest has been repaid to investors.[146] One investor has not received payments since June 2011, with the remaining investors not paid since late 2012.[147]

The investors were told orally and in writing that the C&D investment was secured by assets including real estate in Nevada and California, that the investors are in first lien position, and that the properties are free and clear.[148] Via a radio program, Mogler publicly offered the recycling investment

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[136] See e.g. S-213 at ACC011094.
[137] Exs S-197, S-205, S-206, S-208, S-210 – S-213, S-234.
[138] See e.g. Ex S-213 at ACC011114-11115.
[139] Exs S-17 at ACC003981, 4405-4407, S-27 at 9.
[140] Ex. S-7.
[141] Ex. S-216.
[142] Ex S-216 at ACC009590.
[143] Exs. S-1(c), (f) and (i).
[144] Exs S-31, S-32 at ACC00004717, S-35; HT at 62 – 64; 253, Ex S0224; 253 – 276; 616 – 619, and 653, 657.
[145] HT at 1093 – 1094, 1110 – 1111.
[146] Exs S-215, S-224, S-237, s-240, S-241, S-247, S-252.
[147] Exs S-252, S-215, S-237, S-240, S-241, S-247.
[148] Division Initial Brief at 24; *See e.g.* Ex S-213 at ACC011090, ACC011098, ACC011128; HT Vol V at 651 & 658.

opportunity during the time that the C&D offering was offered and sold. Mogler promoted it as a "safe place to put [an investor's] money" and stated that the "the investor is protected by assets" so that there is a "game plan that is spelled out . . . in terms of getting the investor back their capital."[149] In another broadcast promoting both the recycling and Mexican land investment opportunities, Mogler stated that these investments were a "good, safe investment," meaning that they were "secured by either land or its land-backed security."[150] One investor who invested multiple times in the C&D investment confirmed that he invested as a result of listening to the Investment Roadshow radio broadcast and has "radio" as his referral source on the C&D investor list.[151]

Investors have not received any deeds of trust or securitizing mechanisms for their investments and have not received proof that C&D owns any particular land in Nevada and California or that any such land ownership is free and clear.[152] Mr. Hinkeldey testified that Anthony Salazar was not truthful about the ownership of the Nevada property that Mr. Hinkeldey believes was pledged as security and that C&D did not own it outright.[153]

The C&D investment documents advised investors that the investment was "being sold by the officers and directors of the Company, who will not receive any compensation for their efforts. No sales fees or commissions will be paid to such officers or directors. Notes may be sold by registered brokers or dealers who are members of the NASD and who enter into a Participating Dealer Agreement with the Company. Such brokers or dealers may receive commissions up to ten percent (10%) of the price of the Notes sold."[154] Brian Buckley received nearly $15,000 in sales fee/commissions for C&D investments, but was not an officer or director of C&D, a member of NASD (FINRA), or registered as a dealer or salesman in Arizona.[155]

The report of the accounting expert retained by Mogler to analyze investor funds from 2009-2011 indicates that Casimer Polanchek and his entities received approximately hundreds of thousands of dollars from investor funds for referral fees between 2009 and 2011 and were listed as the referral

[149] Exs S-21, S-23, S-26, S-230, S-255(c); HT at 207 – 208, 209 – 212, 229; 408 – 413, 438 – 444; 535 – 536.
[150] Exs S-21, S-23, S-26, S-227, S-255(b); HT at 207 – 208, 209 – 212, 224 – 229; 408 – 413, 426 – 438, 535 – 536.
[151] Ex S-35; HT at 253 – 254.
[152] HT at 274; 612 – 613, 658; 1043 – 1045.
[153] HT at 1045.
[154] *See e.g.* E-213 at ACC011099.
[155] Exs S-35, S-244, S-250, S-1(j), S-250; HT at 533 – 534, 536-538.

source by numerous investors on the C&D investor list.[156] Neither Polanchek nor his entities were officers or directors of C&D, members of NASD (FINRA), or registered as dealers or salesmen in Arizona.[157]

Between 2010 and 2011, Mogler used approximately $445,000 of investor funds, including C&D investor funds, for personal use that was not disclosed to investors.[158]

G. ERCI Investment – Offer Only

ERCI was a manager-managed limited liability company organized in Arizona in April 2011. The Division states that during the relevant periods, Mogler was the manager of ERCI and the sole signatory on the ERCI bank accounts.[159]

In January 2012, an out-of-state resident was offered an investment with ERCI ("ERCI offeree") in or from Arizona.[160]

The ERCI offeree was emailed a PPM dated December 1, 2011, offering a total of 400 promissory notes in two offerings, with a combined total offering of $10,000,000, a subscription agreement, and a note issued by ERCI ("ERCI investment documents"). The first offering in the ERCI investment was for $25,000 per note, with a total offering of $5,000,000. The first offering provided an 18-percent annual rate of return, interest paid monthly, and a maturity date for payment of principal in 24 months. The second offering was for $25,000 per note, with a total offering of $5,000,000. The second offering provided a 12-percent annual rate of return, interest paid monthly, and a maturity date for payment of principal in 24 months.[161] Note holders had no managerial rights or powers.[162]

According to the ERCI investment documents, ERCI was in the business of investing in rubbish and waste recycling and the purchase/sale of commodities, and investor funds were to be used "to purchase land, equipment, commodities and locomotives, for a new recycling center located in Chicago, Illinois."[163] The ERCI investment documents state that the expanded services in Chicago will

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[156] Exs S-35, S-224, S-256 at 39-40, 44-45, S-259 – 259 at fn 15 & Exhibit 1-M; HT at 1073 – 1074.
[157] Exs S-1(g), (h) & (k), S-7.
[158] Exs S-256 at 45-47, 53-54, S-258 – S-259.
[159] Exs S-6(a), S-19 at ACC008522-25.
[160] Exs S-202 – S-204; HT at 317 – 325.
[161] Exs S-202 – S-2-4. The ERCI investment documents are not clear, but the Division believes that the ERCI offeree was offered the first offering at 18 percent. See Division Initial Brief at 26.
[162] *See e.g.* S-202 at ACC000117.
[163] *See e.g.* Ex S-202 at ACC000108.

be done under the name of ERC Chicago, LLC. The ERCI investment documents list only Peter A. Salazar as active in management in ERCI. Mogler was a signatory for ERCI on the ERCI investment documents. ERCI, the ERCI investment, and Mogler were not registered with the Commission.[164]

The ERCI offeree did not invest with ERCI; according to documents produced by ERCI, no investors invested with ERCI.[165]

While ERCI investment documents list Peter A. Salazar as the only individual in management and state that the success of the business is dependent on his expertise, at the time this investment was offered, ERCI was a manager-managed limited liability company with Mogler as the manager, and Mogler was the sole signatory on the ERCI bank accounts.[166] There is no evidence that Peter A. Salazar had any affiliation with ERCI. Mr. Hinkeldey testified that ERCI was merely a holding company and never an operating company.[167]

Additionally, the ERCI investment documents state that "[t]he Notes being offered by the Company in this Private Placement Offering will be secured by property, equipment and commodities such as locomotives located in its new facility in Chicago, Illinois."[168]

The Division asserts that the ERCI investment documents fail to provide investors with enough information to determine if their investment will be adequately securitized. Further, given that the ERCI investment documents state that operations in Chicago will commence under the name ERC Chicago, LLC, investors holding a note from ERCI would not have the ability to securitize their investments.[169]

H. Testimony from Division Witnesses

1. Ms. Arlene Francis

Ms. Francis and her husband are residents of California. Prior to retirement, Ms. Francis was an administrative assistant, and her husband is a telecommunications engineer.[170] Mr. and Mrs. Francis learned about the TCMLD investment from a friend. The Francises called and exchanged emails with Mr. Buckley and Dennis Narcisco to receive information about the investment, and they were sent

[164] *See e.g.* Ex-S-202 at ACC000115, ACC000109 – 110, ACC000137; Exs S-1(e) & (f).
[165] HT at 325 - 327; Exs S-29, S-32 at ACC004719.
[166] *See e.g.* Ex S-202 at ACC000109 – 110; Exs S-6(a), S-19 at ACC008522-25.
[167] Division Initial Brief at 27; HT at 1084.
[168] *See e.g.* Ex S-202 at ACC000113.
[169] Division Initial Brief at 28; *see e.g.* Ex S-202 at ACC000115.
[170] HT at 461.

information through the mail that originated from Scottsdale, Arizona. Prior to the time they spoke with Mr. Buckley or Mr. Narcisco, nether Mr. or Mrs. Francis had a preexisting relationship with TCMLD or TCBD.[171] Mrs. Francis testified that she received the TCMLD investment documents, but was not made aware that Mr. Stevens had tax liens issued against him in Florida.[172] She testified that she has not been provided any proof that TCMLD purchased any land in Mexico or with evidence of any mechanism that would securitize the investment.[173] Mr. and Mrs. Francis each invested $5,000 in the MCMLD investment and sent or wired the funds to TCBD in Arizona.[174] As of the hearing date, they had not been repaid on their investment. They received a letter from Mr. Stevens in April 2011 requesting an extension of the notes because the economy was not in good shape.[175] They agreed to extend the notes indefinitely.[176]

2. John Ploof

Mr. Ploof and his wife, Lynn, have resided in Arizona for 15 years. Before retiring, Mr. Ploof was a plastic tooling engineer, and his wife is a checker at Basha's. Mr. Ploof learned about the TCMLD investment through a friend and attended a presentation at the Tri-Core office on Chaparral in Scottsdale.[177] Prior to investing, the Ploofs had no preexisting relationship with TCMLD; nor had they invested in Mexican real estate prior to the TCMLD investment.[178] Mr. Ploof testified that during the presentation, they were told about the property's location and how it was expected to appreciate due to a new road.[179] The Ploofs were not told about Mr. Stevens' tax liens. They were told that the investment was very safe.[180] The Ploofs indicated that they were not accredited investors at the time of their investment and that no one at TCMLD or TCBD inquired about their financial condition.[181] Mr. Ploof testified that he and his wife have not received repayment of their investment and that he has not received any proof that the property was purchased or about a mechanism for securitizing the

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[171] *Id.* at 464.
[172] *Id.* at 465.
[173] *Id.* at 466.
[174] *Id.* at 469.
[175] *Id.* at 471-472.
[176] *Id.* at 475.
[177] *Id.* at 478.
[178] *Id.*
[179] *Id.* at 479.
[180] *Id.* at 481.
[181] *Id.* at 482-484.

investment.[182] Mr. Ploof executed an extension of the investment in 2011, when he was told that the original note rate of 80 percent was too high for the company to continue.[183] Following his execution of the extension, Mr. Ploof believed that he heard a few times from Mr. Stevens with updates, which indicated that the economy was bad and "they're working on it."[184]

3. James Whalen

Mr. Whalen and his wife, Alicia, have lived in Arizona for 35 years.[185] Prior to retiring, Mr. Whalen was a construction manager for a fire protection company, and his wife was a school teacher.[186] He testified that a friend of his son's told them about the TCC investments. He met several TCC people at a meeting at the Chaparral office, where they were informed about Lot 5, the investment process, and the terms of the investment. Mr. Whalen visited the property in Mexico, but he was not told anything about Lot 5 other than what was in the investment documents.[187] The Whalens invested $90,000 with TCC.[188] The Whalens did not receive any proof that Lot 5 was acquired or any evidence of security for the notes; nor were they told that another entity offered an investment opportunity in Lot 5, pledging that property as security. Mr. Whalen attended meetings with Mr. Stevens in which it was explained that the economy was problematic and that the company would be seeking an extension of the notes.[189] The Whalens signed the extension documents.

4. Harry Chuck Wong

Mr. Wong lives in Arizona and was married at the time of the investment. He is a senior financial planner with Vanguard Group.[190] Mr. Wong learned about TCC when he was attending an investment seminar and heard a presentation by George Garcia, who was with TCC in investor relations.[191] Several days later, Mr. Wong filled out an investor information sheet.[192] Mr. Wong attended a web-based seminar that discussed the Lot 5 property. Mr. Wong testified that prior to finding

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[182] *Id.* at 485.
[183] *Id.* at 487.
[184] *Id.* at 490.
[185] *Id.* at 491.
[186] *Id.* at 492.
[187] *Id.* at 494
[188] *Id.* at 496.
[189] *Id.* at 497-498.
[190] *Id.* at 502.
[191] *Id.* at 503.
[192] *Id.* at 504.

out about the TCC investment, he did not have a preexisting relationship to TCC and had never invested in property in Mexico.[193] Mr. Wong reviewed the TCC PPM documents prior to investing and was not told that there was an offering by TCMLD for the same Lot 5.[194] Mr. Wong was never provided proof that Lot 5 had been purchased or with any type of securitizing mechanism for his investment.[195] Initially, Mr. Wong received updates from Mr. Buckley, but after November 2008, updates were provided by Mr. Stevens.[196] In the company updates, Mr. Wong was told that a bad economy was making it hard for the company to find a buyer for the property, and he testified that he was led to believe that the property was purchased, but then the sale fell through.[197] Mr. Wong invested $200,000 with TCC and has not received any repayment.[198] At the time of the investment, Mr. Wong believed he was an accredited investor.[199]

5. Brian Buckley

Mr. Buckley has resided in Arizona since 2006. He worked for TCC, TCBD, and Pangaea. He started as a loan officer and became a presenter for different projects in late 2007 when the economy crashed. Mr. Buckley did presentations for Mexican properties and ERC. He stopped in late 2012.[200] He presented both live presentations and webinars; webinars were presented from the Scottsdale office at the Arizona Investment Center.[201] Sometimes he traveled and did presentations in Wisconsin and occasional trade shows. He presented PowerPoints about Mexico or recycling centers. He also appeared on the Investment Roadshow radio program on KFNN.[202] Mr. Buckley was never an officer, director, or manager of TCC, C&D, or ERCC; has never been a licensed securities salesman or broker/dealer in any state; is not licensed with FINRA; and has not had a Participating Dealer Agreement with any of the entities that issued the PPMs at issue.[203] Mr. Buckley testified that he received referral fees for

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[193] *Id.* at 505 and 509.
[194] *Id.* at 509-510.
[195] *Id.* at 510.
[196] *Id.* at 513-514.
[197] *Id.* at 515 and 522.
[198] *Id.* at 516.
[199] *Id.* at 521.
[200] *Id.* at 533-534.
[201] *Id.* at 534.
[202] *Id.* at 535-536.
[203] *Id.* at 536-537.

investors that invested in the various projects at issue, in addition to a salary.[204] He also worked as an operations manager for ERC of Chicago.[205]

6. Kimberly Brown

Ms. Brown lives in Tennessee and has never lived in Arizona. She is a registered nurse.[206] She testified that she met Casimer Polanchek on a cruise and that he told her about an investment in vacation land in Mexico, after several conversations, and gave her contacts at TCC to get more information.[207] Following her vacation, she contacted TCC and spoke with Mogler; she received information and a contract in the mail after a few discussions. She believes she spoke with Mogler and Mr. Hinkeldey.[208] The emails and documents were sent to her from Arizona.[209] When she filled out the paperwork, she indicated that she was unaccredited, and she testified that she had never invested with TCC or in Mexican real estate prior to this investment.[210] She returned the executed documents to the company's Arizona address. Ms. Brown indicated that she has not received proof that TCC acquired Lot 47 or indicating a security interest in Lot 47, and she has not received any repayment on her investment. After the note matured, Ms. Brown requested her money back, but did not receive a direct response.[211] She testified that she never agreed to an extension of the note and has not been told anything about the status of the investment.[212] She invested $15,000 from her IRA.[213]

7. Matthew Hoi Tun Chan

Mr. Chan lives in British Columbia, Canada, where he works as a mortgage broker.[214] Mr. Chan testified that he learned about TCC from Mr. Polanchek when they both attended a personal development seminar in Clear Oaks, California, in June 2009.[215] After the seminar, Mr. Chan stated, he received a telephone call at his home from Mr. Buckley.[216] Mr. Buckley also called Mr. Chan's

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[204] *Id.* a 537-539.
[205] *Id.* at 541.
[206] *Id.* at 553.
[207] *Id.* at 554.
[208] *Id.* at 555.
[209] *Id.* at 556.
[210] *Id.* at 557-558.
[211] *Id.* at 562.
[212] *Id.* at 562.
[213] *Id.* at 563.
[214] *Id.* at 567.
[215] *Id.* at 568.
[216] *Id.*

brother, Elton Chan, who also lives in Canada. Mr. Buckley told them about an investment in Mexican land and sent them both a package of documentation.[217] The documents indicate that the investment was made in July 2009 and that Mr. Chan was not accredited at the time he invested.[218] Mr. Chan testified that neither he nor his brother had invested with TCC or in Mexican real estate prior to this investment.[219] He testified that he and his brother returned the executed investment documents related to Lot 47 to TCC in Scottsdale.[220] After the note came due, Mr. Chan asked TCC about the purchase of Lot 47 and received a document in Spanish (apparently showing the owner of Lot 47). Neither Mr. Chan nor his brother ever received evidence of a security interest in Lot 47.[221] He and his brother both invested $70,000, and neither has received any repayment.[222] In 2011, Mr. Chan was told the company was going to exercise its right to extend the notes for a year, but Mr. Chan did not agree to an extension.[223] At the end of a year, Mr. Chan was told that the company was having trouble selling the property and that there would be no payout at that time.[224] Mr. Chan testified that losing the amount of money involved created personal financial hardship.[225]

8. Mark Sherman

Mr. Sherman lives in Arizona and is self-employed with a couple of manufacturing companies, known as Fuel Fresh, Inc. and Floatron, Inc.[226] In June 2010, Mr. Sherman invested $100,000 in TCC for the Relaxante project. Mr. Polanchek introduced Mr. Sherman to TCC, and Mr. Buckley provided him with information on the project through a slideshow at the Tri-Core offices on Chaparral.[227] Mr. Sherman testified that he has not been provided with evidence of the purchase of the property or with evidence of security for the notes.[228] Mr. Sherman stated that he was told payments were not being made at maturity for various reasons, including that they were waiting for a better offer for the

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[217] *Id.* at 570-571.
[218] *Id.* at 571-572.
[219] *Id.* at 572.
[220] *Id.* at 573.
[221] *Id.* at 575.
[222] *Id.* at 576.
[223] Id. at 577.
[224] Id.
[225] Id. at 578.
[226] *Id.* at 584.
[227] *Id.* at 586-588.
[228] *Id.* at 590.

property.[229] In addition, in August 2011, Mr. Sherman invested $35,000 in ERCC.[230] Mr. Sherman's investor questionnaire for the ERCC offering was blank, and he testified that if the document was not signed, it was because no one at ERCC raised the question of Mr. Sherman's or his companies' financial status.[231] Mr. Sherman met Mr. Polanchek at a bar at the Royal Palms Resort; Mr. Polanchek struck up a conversation, and they discussed financial investments. Mr. Sherman called Mr. Polanchek the next day and shortly thereafter met with TCC.[232] Mr. Sherman and Mr. Polanchek became friendly, and Mr. Polanchek told him about ERCC while at a function in Las Vegas. Mr. Sherman received some payments on the ERCC investment, but no evidence of the purchase of equipment or of securitization of the notes.[233] Mr. Sherman testified that he was told that the ERCC notes were not being paid because of some sort of dispute between Tony Salazar and Mogler.[234] Mr. Sherman also testified about investments he and his mother made in C&D.[235] Mr. Sherman testified that he was not asked about his or his companies' financial status when they invested in C&D. Mr. Polanchek introduced Mr. Sherman to the C&D investment, and Mr. Sherman attended a presentation that included a tour of the yard.[236] Mr. Sherman or his companies received some payments on their investments in C&D.[237] In response to questions from Mogler, Mr. Sherman testified that he had discussions with Mogler about having Mogler draft promotional materials and business plans for Mr. Sherman's businesses.[238] Mr. Sherman testified that between himself, his mother, and his brother, over $3 million has been invested with respondents, but that this amount includes more than the investments that are the subject of this proceeding.[239]

9. Jerome Gussiaas

Mr. Gussiaas lived in Arizona from approximately 2004 until 2008 and lived in Minnesota at

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[229] *Id.* at 591.
[230] *Id.* at 591-593.
[231] *Id.* at 594-598. Fuel Fresh and Floatron invested $100,000 with ERCC.
[232] *Id.* at 599-600.
[233] *Id.* at 601-603.
[234] *Id.* at 604.
[235] *Id.* at 604-611.
[236] *Id.* at 612.
[237] *Id.* at 613-614,
[238] *Id.* at 620-621.
[239] *Id.* at 624-625.

the time of the hearing.[240] Mr. Gussiaas is a banker. Mr. Gussiaas learned about the investment opportunity with TCC from Amy Bridges, a close friend of Mogler's, who told him about the general nature of the investment.[241] Mr. Gussiaas met with Mr. Buckley, who had him sit through a webinar, and whom he talked to several times on the phone and ran into at a vendor fair in Los Angeles. [242] Mr. Gussiaas invested $50,000 in August 2008, and $30,000 in October 2008, with TCC in connection with Lot 47.[243] Prior to 2008, Mr. Gussiaas had never before invested with TCC or in Mexican real estate.[244] Mr. Gussiaas testified that he has not received proof that TCC purchased the property, proof of securitization of the note, or any repayments.[245] Mr. Gussiaas testified that when he contacted the company after the notes matured, he was directed to language in the documents that allowed the company to extend the maturity for a year; when that extension had matured, he contacted the company and was asked for another extension so that the company would not be in default.[246] He stated that he received an extension document, but did not sign it because it did not have a maturity date.[247] Eventually, when the company would not add a maturity date, Mr. Gussiaas sent a demand letter seeking repayment.[248] Subsequently, Mr. Gussiaas met with Mr. Mogler and Mr. Buckley and was told the company did not have the funds to repay him.[249]

10. Lisa Davis

Ms. Davis has lived in Nevada for 30 years, and works for the University of Nevada Las Vegas.[250] Ms. Davis attended a three-month leadership and trust program where she was paired with Mr. Polanchek. During that time, Mr. Polanchek told her about investments in Mexican real estate and in recycling.[251] Mr. Polanchek told her that he had invested in the projects and that they were safe because they were secured by assets. Ms. Davis testified that she had never invested with Mr. Polanchek

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[240] *Id.* at 631-632.
[241] *Id.* at 632.
[242] *Id.* at 633.
[243] *Id.* at 637.
[244] *Id.* at 638.
[245] *Id.* at 639.
[246] *Id.* at 640-641.
[247] *Id.* at 641-642.
[248] *Id.* at 643.
[249] *Id.* at 648-649.
[250] Id. at 649.
[251] *Id.* at 650-651.

before and had never before heard of C&D. Ms. Davis called Mogler, and they discussed both the Mexican land and C&D investments. She also watched a presentation about the investments on her computer. Because of her background in environmental science, she liked the C&D investment, and she was mailed C&D investment documents from Arizona.[252] Ms. Davis testified that she did not discuss her financial status with C&D or Mogler, but that at the time they were in the leadership program, Mr. Polanchek knew that she had financial troubles as a single parent. She testified that Mr. Polanchek knew that the offering would be a big investment for her.[253] Ms. Davis returned the C&D investment documents and check to TCBD in Arizona using a prepaid envelope.[254] Ms. Davis testified that she knew from the description of the investment from Mr. Polanchek and the investment documents that the investment would be secured by real estate in Nevada and California, but did not know what specific property was pledged and has not been provided with evidence of a secured interest.[255] Ms. Davis received payments under the notes with checks issued by TCBD or ERC of Nevada.[256] Ms. Davis testified that she was told that some sort of legal dispute between Peter Salazar and C&D was the reason for the notes not being paid, and she received an update from Guy Quinn stating that C&D was still operating, but there were no payments for investors.[257] Ms. Davis testified that after her note matured, she contacted the company about why the note was not being paid and received a document from Peter Salazar that verified the validity of the note.[258] Ms. Davis testified that she was suffering a financial hardship as a result of the investment because she had taken a loan from her IRA, and has had to repay that loan on top of her other bills, has defaulted on those payments, and has suffered tax penalties as a result.[259]

11. Jessica Hogan

Ms. Hogan resides in Arizona and was using her maiden name, Pries, at the time of her investment.[260] Ms. Hogan was a college professor at the time she testified, and prior to that had been a

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[252] *Id.* at 653-654.
[253] *Id.* at 656,
[254] *Id.* at 657.
[255] *Id.* at 658.
[256] Id. at 659.
[257] *Id.* at 660-661.
[258] *Id.* at 661-661; Ex S-214.
[259] HT at 663.
[260] *Id.* at 673-674.

personal trainer and stay-at-home mom. Ms. Hogan learned about the investment with TCC through her friend Casimer Polanchek.[261] She testified that Mr. Polanchek invited her to the TCC offices to hear about the investment and that she observed a PowerPoint presentation from Mr. Buckley.[262] During that presentation, she learned that the investment would be secured by land in Mexico. Prior to investing, she said, she had lunch with Mogler, who talked about his experience developing land.[263] Ms. Hogan testified that prior to learning about TCC from Mr. Polanchek, she had no preexisting relationship with TCC and had not invested with them before.[264] Ms. Hogan testified she attended a second PowerPoint presentation with her husband, at which they were told how the funds would be used.[265] She testified that she invested $10,000 in March 2011, but was never given a property address or lot designation and does not know exactly what Mexican land was supposed to be purchased.[266] She testified that when her note matured, she contacted TCC and was told that the sale of the land had fallen through; that they were looking for another buyer; and that she would receive her funds once the deal was done.[267] Ms. Hogan testified that the loss of her investment funds has been a challenge since her husband lost his job in 2012 and they had to sell their house and an apartment in California and borrow money from family to make it through.[268]

12. Jeannene Kristy Barnes

Ms. Barnes has lived in Arizona for 50 years and is employed as a manufacturing specialist.[269] Ms. Barnes learned of TCMLD through Cory Sanchez, who invited her to a seminar by Tri-Core Engineering for a land development in Mexico.[270] She attended a PowerPoint presentation by Mr. Buckley at the company's office in Scottsdale. She was told that the note would be secured by property; that title would be done by people in the United States to be safer; and that the money would fund infrastructure development for Lot 5, which was beachfront property.[271] Prior to attending the seminar,

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[261] *Id.* at 674.
[262] *Id.* at 675.
[263] *Id.* at 677.
[264] Id.
[265] *Id.* at 678
[266] *Id.* at 681-682.
[267] *Id.* at 682-683.
[268] Id. 683-684.
[269] *Id.* at 687.
[270] *Id.* at 688.
[271] *Id.* at 689.

she had no prior relationship with TCMLD or TCBD.[272] Ms. Barnes received the investment documents before investing and invested $15,000 in December 2007.[273] At the time of her investment, Ms. Barnes indicated that she was unaccredited.[274] When the notes matured without payment, Ms. Barnes contacted the company and was told by Mr. Stevens that the deal had fallen through and there was no money to pay investors.[275] At a subsequent meeting with investors, Mr. Stevens told them that the land had never been purchased and that investor funds had been used for land studies, lawyer fees, and things like that.[276] Ms. Barnes testified that in a phone call with Mr. Stevens, she was told that because of the housing market collapse and SB 1070, they were having trouble financing the development of the property, and they were working with a wealthy family to purchase the property; Ms. Barnes executed an extension in or around April 2011.[277] Ms. Barnes testified that after she lost her job in 2009, she lost her home to foreclosure, and that she has had a tough time after the loss of her investment money.[278] Even though the loan documents noted expenses for engineering costs and legal expenses, etc., Ms. Barnes was led to believe that the investor funds would be used to purchase the property. Ms. Barnes knew the investment was risky, but the 80-percent interest rate, plus being secured by the land, made her willing to take the risk.[279]

I. Tri-Core Respondents' Witnesses

1. Casimer Polanchek

Mr. Polanchek owned Pangaea d/b/a AIC with another individual.[280] Mr. Polanchek testified that he and Mr. Sherman met at the Royal Palms Resort and that they became close friends.[281] He testified that he met Matt Chan at a self-improvement camp in California and that they became friends.[282] He testified that he and Lisa Davis also were friends.[283] Mr. Polanchek testified that he had

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[272] *Id.* at 689.
[273] *Id.* at 694-695
[274] *Id.* at 696.
[275] *Id.* at 697.
[276] *Id.* at 698.
[277] *Id.* at 699-701; Ex S-106.
[278] HT at 702.
[279] *Id.* at 708-709.
[280] Id. at 728-729.
[281] *Id.* at 732-734.
[282] *Id.* at 735.
[283] Id. at 735.

been friends with Guy Quinn, who owns the ERC Entities, for 20 years, and that Mr. Quinn had promised him an interest in the business for his help.[284] Mr. Polanchek stated that he dated Jessica Hogan, and gave her $10,000 to set up a retirement investment fund, but stated that he could not recall when.[285] Mr. Polanchek testified that he could not recall the timeframe when they purportedly dated.[286] Mr. Polanchek's business, Pangaea d/b/a AIC, was a sponsor of the Investment Roadshow on the radio, and Mr. Polanchek believed that the disclaimers that were part of the broadcast made it clear that the discussion did not constitute an offer to buy or sell securities.[287] Mr. Polanchek testified that no one showed up at any seminars because of the radio broadcast.[288] Mr. Polanchek could not recall how long the radio show was on the air and did not know who would give the seminars if anyone showed up.[289] Mr. Polanchek would rent the AIC office space to various companies, but could not recall specific renters or if he was receiving rent.[290] He stated that he did not recall how long he had known Mr. Mogler or where they met.[291] Mr. Polanchek received referral fees from some of the companies that are part of this proceeding, but stated that he did not know how much he received.[292] He stated that he did not know how the AIC website operated or how long it was operational or who would answer calls from the phone numbers on the website.[293] Mr. Polanchek testified that he did not know which Mexican land deal he had invested in.[294]

2. James Stevens

Mr. Stevens is in the business of real estate development and is an appraiser.[295] In or around 2007, Mr. Stevens entered into an arrangement with Vince Gibbons, an engineer with Tri-Core Engineering, and Silvia Torres to purchase property in Mexico on the Sea of Cortez.[296] Mr. Stevens testified that to own property in certain parts of Mexico, you must be a Mexican citizen, have a bank

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[284] *Id.* at 736.
[285] *Id.* at 738, 742 & 763-764.
[286] *Id.* at 764.
[287] *Id.* at 7343-744.
[288] *Id.* at 745.
[289] Id. at 747.
[290] *Id.* at 751-752.
[291] *Id.* at 753-756.
[292] *Id.* 758-759.
[293] *Id.* at 760-762.
[294] *Id.* at 766.
[295] *Id.* at 769.
[296] *Id.* at 775-780, 799-800.

trust, or use a Mexican corporation.[297] He testified that they had a contract to acquire Lot 5, and were looking at ways to develop it; that the Santa Clara Resorts had expressed an interest in acquiring the Lot 5 parcels; and that they had been in negotiations with a group from Phoenix when the market for real estate collapsed in 2008.[298] After the Stevens group had placed a contract on Lot 5 for $1.7 million, the seller of the property reneged and accepted a purchase offer from a different party.[299] TCMLD entered into an independent contractor agreement with TCBD, under which TCBD would receive Parcel 5 of Lot 5 as compensation for its work raising funds for the project.[300] A Notice of Intent to Sell Securities Pursuant to Regulation D was filed on behalf of TCMLD, and Mr. Stevens believed that the TCMLD offering was properly registered under Regulation D, and that there had not been any general solicitation.[301] Mr. Stevens testified that he had met with investors in TCMLD and established an advisory committee.[302] Mr. Stevens also testified that there is ongoing litigation in Mexico over the ownership of Lot 5.[303] Mr. Stevens viewed the TCMLD offering as a loan and not any kind of profit sharing.[304] He testified that the TCMLD offering provided that the proceeds would be used for offering expenses of $350,000, engineering expenses of $350,000, marketing expenses of $200,000, and website development expenses of $25,000, for a total of $925,000.[305] Mr. Stevens testified that when they became aware of the problems with the title to Lot 5, they stopped raising money.[306] Mr. Stevens testified that TCMLD looked at developing Lot 5 itself, or selling it to a third-party purchaser.[307] Mr. Stevens testified that he does not know why investors were not told that TCMLD could not hold title to Lot 5 under Mexican law and did not know how note holders could execute on their security interest if TCMLD did not hold the title.[308] He stated that the $925,000 of funds raised went to TCBD for the offering costs and that TCMLD would need an additional $1.4 million if it were successful in the

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[297] *Id* at 781, 834.
[298] *Id.* at 783-784.
[299] *Id.* at 790-792, 826-830, 841-842.
[300] Id. at 801-804.
[301] *Id.* at 805, 811, 816; Ex R-10.
[302] *Id.* at 807, 812.
[303] *Id.* at 808, 812-814, 821-822.
[304] *Id.* at 810.
[305] *Id.* at 817.
[306] *Id.* at 818-819, 843-844.
[307] *Id.* at 832-833.
[308] *Id.* at 835, 837

lawsuit and able to acquire Lot 5 for $1.7 million.[309] In addition to the up-front money, TCBD was to receive Parcel 5 of Lot 5.[310] Mr. Stevens testified that he does not know what an "administration account" is or who controls it.[311] He testified that he had no preexisting relationship with any of the investors in the TCMLD offering.[312]

3. Jim Hinkeldey

Mr. Hinkeldey lives in Arizona and has been in real estate and finance for his entire career. He met Mogler when they both worked at a mortgage company, in approximately 2004.[313] Mr. Hinkeldey became a consultant for TCBD and created TCC with Mogler and Vince Gibbons in order to "take advantage" of beachfront properties on the Sea of Cortez.[314] Mr. Hinkeldey testified about his understanding that an American citizen who wants to buy real property in the restricted zones of Mexico needs to hold title via a bank trust with a renewable term of 50 years, and that an American corporation that wants to own property in the restricted zone must form two LLCs and create an "S. de R.L."[315] He testified that TCC cannot own commercial beachfront property in Mexico.[316] He testified that Lot 47 had already been purchased by TCBD, although he did not know the purchase price or where there was documentation of the purchase of Lot 47 by TCBD.[317] Mr. Hinkeldey believes it took three years to perfect title to Lot 47.[318] Mr. Hinkeldey testified that he believes the best way for the investors in Lot 47 to secure their investment is to have their names recorded on the title, or to form another LLC and become an owner of Phoenix Premium Developers.[319] He testified that the registration has not been done because it is very expensive, and the company does not have the funds.[320] He stated that he believed the Lot 47 offering was exempt from registration requirements under Regulation D of

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[309] *Id.* at 839-840.
[310] *Id.* at 845.
[311] Id. at 847.
[312] *Id.* at 849.
[313] *Id.* at 877-878.
[314] Id. at 880-885
[315] *Id.* at 899-900
[316] *Id.* at 990, 1004-1005.
[317] *Id.* at 901. 904-908, 997-1002, 1086-1087, 1089. According to Ex S-45(b), title to Lot 47 is with Phoenix Premium Developers, a limited liability corporation.
[318] *Id.* at 909-910.
[319] *Id.* at 1010-1011.
[320] *Id.* at 1011.

the Securities Act.[321] He testified that TCC is holding title to Lot 47.[322] Mr. Hinkeldey testified that Lot 3 is currently under contract and held by Silvia Torres, who has Mexican citizenship.[323] Reading from the Lot 47 PPM, Mr. Hinkeldey noted various risk factors described in the investment documents, including that the company did not have any other assets beyond the property, that the state of the economy would affect the company, and a statement made as to the suitability of investors and their financial ability to assume the risks indefinitely.[324] Mr. Hinkeldey identified documents from Peter Anthony Salazar to Mark Sherman that acknowledge responsibility for the obligations of C&D and ERCC to Mr. Sherman and his corporations by ERC of Chicago.[325] Mr. Hinkeldey testified that he had been involved in drafting some of the PPMs at issue in this case and believed that the first PPM had been created from a download from a Reg D Resources website and that deciding it was complete and correct had been a group effort in the TCC office.[326] He testified that the TCC 2/08 offering was intended to affect only parcel 5 of Lot 5 and that from the time of the offering until the date of hearing, TCC did not have an ownership interest in Lot 5.[327]

IV. The Parties' Positions

A. The Division's Position

The Division argues that it established that TCBD, TCC, ERCC, C&D and ERCI offered and/or sold securities in or from Arizona in the form of notes and that the notes were offered or sold in violation of the anti-fraud provisions of the Securities Act. The Division asserts that these investments fall squarely under the definition of securities under the Securities Act, A.R.S. § 44-1801(26), which defines "any note" as a security.

The Division argues that the notes in this case are securities for purposes of registration violations, under the holding in *State v. Tober*, in which the Arizona Supreme Court held that the Securities Act provided a clear definition of the term "note" and that all notes are securities that must

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[321] *Id.* at 914.
[322] *Id.* at 920.
[323] *Id.* at 1031-1034, 1088.
[324] *Id.* at 915-924, 938-951.
[325] *Id.* at 969-983.
[326] *Id.* at 1056-1060.
[327] *Id.* at 1060-1062.

be registered with the Commission unless an exemption applies.[328] In this case, the Division argues, the notes were titled "Promissory Notes," and they all contained two-year terms and provided 18-percent, 24-percent, 40-percent, 60-percent or 80-percent interest. The Division argues that all of the investments at issue clearly meet the definition of "any note" and are subject to the registration requirements unless an exemption applies.[329] Because the Securities Act (A.R.S. § 44-2033) places the burden on Respondents to show that an exemption applies, and none of the Respondents have presented any evidence establishing that an exemption applied to any of the investments, the Division argues that all of the investments are securities for purposes of the registration provisions of the Securities Act.

The Division also argues that the notes at issue are securities under the anti-fraud provisions of the Securities Act.[330] The Division notes that in *MacCollum v. Perkinson*, the Arizona Court of Appeals adopted the "family resemblance" test set out by the United States Supreme Court in *Reves v. Ernst & Young* to determine if an offering is a security under the anti-fraud statute.[331] In *Reves*, the Court started with the presumption that notes are securities and established a two-part test that can rebut the presumption. The first part of the test, comprised of four prongs, requires a showing that the note "bears a strong resemblance" to one of the instruments listed in the enumerated category of exceptions. The four factors are balanced to reach a determination, and failure to satisfy one of the factors is not dispositive, as they are considered as a whole.[332]

The Division states that the first factor, which is to assess the motivations of the buyer and seller to enter into the transaction, supports finding that the notes at issue in this case are securities. Under this factor, if the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments (not a minor asset or consumer good), and the buyer is interested primarily in the profit the note is expected to generate, then the instrument is likely to be a security. The Division points out that in this case, the notes for the Mexican land investments specifically stated that investment funds would be used to finance the purchase or development of Mexican land—a

[328] Division Initial Brief at 28, *citing State v Tober*, 841 P.2d 206 (1992).
[329] *Id.* at 29.
[330] *Id.*
[331] *Id.* at 29 (citing *MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996); *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990)).
[332] *See McNabb v. S.E.C.*, 298 F.3d 1126, 1132-33 (9th Circuit 2002)(although the third factor supported neither position, the notes in question nevertheless constituted securities).

substantial investment—and that the investment documents for the recycling investments stated that the investor funds would be used to purchase significant assets such as equipment and to expand the business—also a substantial investment. The Division asserts that general use of investor funds by the businesses favors a finding that the notes are securities and that the significant interest rates on the notes, ranging between 18 and 80 percent, demonstrate that investors purchased the notes with the expectation of a substantial return on their investment.[333] For the foregoing reasons, the Division argues that the first factor of the *Reves* test supports a finding that the investments are securities.

The second *Reves* factor involves the plan of distribution, focusing on whether the investment is offered and sold to a broad segment of the public, which can establish the requisite "common trading" in an instrument.[334] In this case, the Division asserts that the various offerings were offered and/or sold to the public at large, as evidenced by the investor lists and documents provided by Respondents; statements made by investors; and the statements of the issuer's main salesman, Brian Buckley. The Division states that hundreds of individuals or entities invested in the various Mexican land and recycling offerings, including residents of numerous states as well as Canada and Denmark.[335] The Division states further that investors in the Mexican land offerings learned of the offerings through solicitations via magazine advertisements and seminars/presentations either in-person or via the internet and information provided by their self-directed IRA provider, and that some of the offerings were promoted via public radio broadcast on the Investment Roadshow.[336] The Division notes that multiple investors testified that they had no preexisting relationship with TCMLD or TCC before investing and that Mr. Stevens testified that he did not know the investors who invested with TCMLD, that they had no preexisting relationship with TCMLD before investing, and that he could not identify how they were solicited.[337] TCC's representative also testified that except for possibly one, the TCC investors had no preexisting relationship with TCC, and he had no idea how they were solicited. The Division states that the recycling offerings were also offered and/or sold to the public at large via

[333] Division Initial Brief at 30.
[334] 185 Ariz. at 187, 913 P.2d at 1105.
[335] Division Initial Brief at 31.
[336] Division Initial Brief at 31.
[337] HT at 478; HT at 505, 677, 689.

presentations, webinars, and radio broadcasts.[338]

The Division asserts that in defining common trading, federal courts have considered the fact that individuals, as opposed to financial institutions, were solicited, and have found the common trading element to be satisfied due to the purchaser's need for protection under the securities laws. The Division argues that this factor also weighs in favor of a finding that the note investments are securities.

The third factor to consider, which is closely related to the first factor of motivation, is whether a reasonable member of the investing public would consider the note to be an investment.[339] The *Reves* Court stated that particularly when promoters characterize notes as "investments," it is "reasonable for a prospective purchaser to take [the promoters] at [their] word."[340] The Division notes that in this matter, the investment documents for all of the offerings on their face refer to the notes as "securities" in numerous places, and also refer to the notes as "investments" and the noteholders as "investors."[341] Correspondence to and from the offerees refer to "investors" and "investments," and the offerings were promoted on the radio to "investors" as "investments." The Division states that investors purchased the notes with the expectation of a substantial return on their investment, as reflected in the significant interest rates. Thus, the Division argues, the third factor weighs in favor of finding the notes to be securities.[342]

The fourth factor to consider is whether some factor, such as the existence of another regulatory scheme, significantly reduces the risk of the investment, thereby rendering application of the securities laws unnecessary.[343] In this case, the Division notes, despite statements referring to the offering as "Secured Promissory Notes," none of the investments were actually securitized. Thus, the Division argues, the fourth *Reves* factor supports finding that the offerings are securities,[344] and the four factors that comprise the first part of the *Reves* test together support a finding that the notes at issue here are securities.

The second part of the *Reves* test provides that if the note does not resemble one of the families

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[338] Division Initial Brief at 31.
[339] S.E.C. v J.T. *Wallenbrock & Associates,* 313 F.3d 531, 539 (*citing MacNabb*, 298 F.3d at 1132).
[340] *Reves*, 494 U.S. at 69.
[341] Division Opening Brief at 33.
[342] *Id.* at 33.
[343] *Reves*, 494 U.S. at 68; *see also*, *MacNabb,* 298 F.3d at 1132.
[344] Division Initial Brief at 33.

of notes that are not securities, then, using the same four factors, the presumption may be rebutted by a showing that the note represents a category that should be added as a non-security. The Division argues that the analysis of the four factors negates rebuttal of the presumption in the second part of the *Reves* test and, thus, that the notes at issue in all of the offerings are securities for purposes of the anti-fraud provisions of the Securities Act.[345]

A.R.S. § 44-1841 makes it unlawful to offer or sell securities in or from Arizona unless they have been registered. The Division states that pursuant to A.R.S. § 44-2034, the Division presented certificates of non-registration for the securities at issue, which established that none of the offerings were registered with the Commission.[346] Thus, the Division argues, all of the offerings at issue violated A.R.S. § 44-1841.

In addition, A.R.S. § 44-1842 makes it unlawful for any dealer or salesman to offer or sell any securities in or from Arizona unless the dealer or salesman is registered with the Commission. There is no evidence to indicate that any of the persons who offered or sold the securities at issue herein were registered with the Commission. Thus, the Division asserts, the dealers that offered or sold the securities at issue in or from Arizona violated A.R.S. § 44-1842.

The Division argues that TCBD is liable for registration violations from the TCMLD offerings. TCMLD has already been found to have violated A.R.S. §§ 44-1841 and 44-1842 by default and ordered to pay administrative penalties and restitution to its investors in this matter.[347] The Division asserts that it established at hearing that the TCMLD offering was not registered with the Commission in violation of A.R.S. § 44-1841.[348] In addition, the Division states, it showed that TCBD was not registered as a dealer or salesman when offering and selling TCMLD's unregistered security, which violated A.R.S. § 44-1842.[349] The Division states that, at hearing, it established 61 investments in the TCMLD offering that were offered and sold in or from Arizona and argues that, as a result, TCBD violated A.R.S. § 44-1841 and A.R.S. § 44-1842 61 times.[350]

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[345] *Id.* at 34.
[346] Exs S-1(a), (b), (d), (e) & (f).
[347] See Decision No. 73667.
[348] Division Initial Brief at 34.
[349] Ex S-1(c).
[350] Division Initial Brief at 35.

The Division asserts that it established at hearing that the TCC offerings dated 2/08, 3/08, and 6/10 were not registered with the Commission and thus that the offers and sales of these offerings by TCC violated A.R.S. § 44-1841. In addition, the Division asserts that the offers and sales by TCC for these offerings also violated A.R.S. § 44-1842 because TCC was not registered as a dealer or salesman.[351] According to the Division, the evidence establishes that because the TCC 2/08 offering was offered and sold seven times in or from Arizona, TCC violated A.R.S. § 44-1841 and A.R.S. § 44-1842 seven times for the 2/08 offering; because the TCC 3/08 offering was offered and sold by TCC 29 times in or from Arizona, TCC violated A.R.S. § 44-1841 and A.R.S. § 44-1842 29 times for the 3/08 offering; and because the TCC 6/10 offering was offered and sold by TCC in or from Arizona 7 times, TCC violated A.R.S. § 44-1841 and A.R.S. § 44-1842 7 times for the 6/10 offering.

The Division states that it established at hearing that the ERCC offering was not registered with the Commission, that ERCC was not registered as a dealer or salesman, and that as a result, the offers and sales of the ERCC offerings by ERCC violated A.R.S. § 44-1841. The Division also states that ERCC violated A.R.S. § 44-1842 because ERCC was not registered as a dealer or salesman when making the offers and sales. The Division states that it presented evidence that ERCC offered and sold the ERCC offerings in or from Arizona 10 times and, thus, that ERCC violated A.R.S. § 44-1841 and A.R.S. § 44-1842 10 times for the ERCC offering.

The Division states that it presented evidence at hearing that the C&D offering was not registered with the Commission, and therefore that the offering and selling of the unregistered investment violated A.R.S. § 44-1841. The Division also states that TCBD also offered and sold the unregistered C&D offering in or from Arizona in violation of A.R.S. § 44-1841. The Division states that TCBD, through Mogler, executed a Consultant Agreement with C&D, including preparing the C&D investment documents and acting as investor liaison, for a fee of $1,500,000.[352] The C&D investment documents advised investors that TCBD was acting as agent for C&D and directed investors to deliver their investment documents to TCBD in Scottsdale, Arizona, and to make their investment checks payable to TCBD.[353] The Division asserts that neither C&D nor TCBD were registered as

[351] *Id.*
[352] Division Initial Brief at 36.
[353] *Id., see e.g.* Ex S-213 at ACC011114-11115.

dealers or salesmen when offering and selling the unregistered security and thus that both violated A.R.S. § 44-1842. The Division states it presented evidence that C&D and TCBD offered and sold the C&D offering in or from Arizona 11 times and therefore violated A.R.S. § 44-1841 and A.R.S. § 44-1842 11 times for the C&D offering.

The Division states that at hearing it established that the ERCI offering was not registered with the Commission, that ERCI was not registered as a dealer or salesman, and that it thus has shown that the offer of the ERCI offerings by ERCI violated A.R.S. § 44-1841. The Division asserts that ERCI also violated § 44-1842 because it was not registered as a dealer or salesman when making the offer. The Division argues that because it presented evidence that ERCI offered the ERCI offering in or from Arizona, it has established that ERCI violated § 44-1841 and A.R.S. § 44-1842.

The Division also argues that all of the offerings at issue were sold in violation of the anti-fraud provisions of the Securities Act and that, as the controlling person of most of the primary violators, Mogler has joint and several liability for the fraud.[354]

The Division asserts that fraud, including untrue statements of material fact and material omissions, in the offer or sale of securities violates the Securities Act.[355] The Division notes that as it relates to fraud, the standard of materiality is whether a reasonable investor would have wanted to know the omitted facts,[356] and the term "material" requires a showing of substantial likelihood that, under all the circumstances, the misstated or omitted fact would have assumed actual significance in the deliberations of a reasonable investor.[357] The Division asserts that there is an affirmative duty not to mislead potential investors in any way and that the investor is not required to investigate or act with due diligence.[358] In addition, the Division asserts that a misrepresentation or omission of a material fact in the offer and sale of a security is actionable even though it may be unintended or the falsity or misleading character of the statement may be unknown, which means that "scienter" or "guilty

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[354] Division Initial Brief at 37.

[355] *Id., see* A.R.S. § 44-1991(A)(2) (it is a fraud to "[m]ake any untrue statement of material fact, or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading.")

[356] *See Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 887, 892(App. 1981).

[357] *See Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 553, 733 P.2d 1131, 1136 (1986).

[358] *Trimble*, 152 Ariz. At 553, 733 P.2d at 1136.

knowledge" is not an element of a violation of A.R.S. § 44-1991.[359] The Division notes that this means that a seller of securities is strictly liable for any of the misrepresentations or omissions the seller makes.[360] And, unlike common law fraud, reliance on a misrepresentation is not an element of fraud involving the offer or sale of securities.

The Division asserts that TCBD, acting as the dealer for the TCMLD offering, is liable for the anti-fraud violations used to offer and sell the investment. The Division asserts the following are fraudulent misrepresentations or omissions related to the TCMLD offering:

(a) Touting Stevens's business acumen, but failing to disclose that Stevens had multiple federal tax liens recorded against him.

(b) Misrepresenting Mogler's resume and qualifications;

(c) Claiming that the notes related to the Mexican Lot 5 were secured by land that TCMLD would own, without informing potential investors that an American entity cannot legally directly own the land, of the risks that their investments would not be secured, and that one of the five parcels of Lot 5 that was supposed to collateralize investors had been promised to TCBM as compensation;[361]

(d) Failing to disclose on-going litigation in Mexico concerning the title to Lot 5; and

(e) Misrepresenting salesmen qualifications regarding commissions.[362]

The Division asserts that the material misrepresentations and omissions constitute at least 7 instances of violations of A.R.S. § 44-1991 for all 61 TCMLD investors, and another violation (failure to disclose the legal issues pending on Lot 5) for at least 30 TCMLD investors. Thus, the Division argues that TCBD violated A.R.S. § 44-1991 over 450 times for this offering.[363]

The Division argues that TCC is liable for fraud related to the TCC 2/08 offering because of the following material fraudulent misrepresentations or omissions related to the TCC 2/08 offering:

(a) Failure to use investor funds for the stated purposes, as investors were told their

[359] *See e.g. State v Gunnison*, 127 Ariz. 110, 113, 618 P.2d 604, 607 (1980).
[360] *Rose*, 128 Ariz. At 214, 624 P.2d at 892.
[361] Division Initial Brief at 39.
[362] *Id.* at 40.
[363] Division Initial Brief at 40-41.

funds would be used to purchase Lot 5, but Lot 5 has not been purchased to date, and TCC's representative could not identify how investor funds were used;[364]

(b) Failure to disclose that TCC could never own the land directly and did not own the land and did not and could not securitize the notes, to disclose the risk that the investment would not be secured, and to disclose that the Lot 5 referenced in the TCC 2/08 investment was the same property pledged as security for investors in the TCMLD investment;

(c) Misrepresenting that the investment would be secured by the full 250-acre Lot 5, when the actual security was intended to be only a portion of Lot 5;[365]

(d) Failure to disclose on-going legal issues related to the validity of a purchase contract for Lot 5;[366]

(e) Misrepresenting management's qualifications by claiming that Mogler had an impressive resume and degree from Arizona State University, when he did not; and

(f) Misrepresenting salesmen qualifications regarding commissions, as Mr. Buckley who received sales fees/commissions for all but one of the TCC 2/08 Lot 5 investors, was not an officer or director of TCC, a member of NASD (FINRA), or registered as a dealer or salesman in Arizona.[367]

The Division argues that the above material misrepresentations and omissions constitute at least 8 instances of violations of A.R.S. § 44-1991 for the 7 TCC 2/08 investors and, thus, that TCC violated A.R.S. § 44-1991 over 50 times for this offering.

The Division argues that TCC is liable for the anti-fraud violations used to offer and sell the TCC 3/08 investment. The Division asserts the following material fraudulent misrepresentations and omissions related to the TCC 3/08 offering:

(a) The TCC 3/08 investment documents stated that the investment was promissory notes to be secured by the land Tri-Core Companies LLC was to purchase, known as "Lot 47" or "Relaxante," and Mogler and others made statements that the TCC 3/08 investment was safe because

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[364] *Id.* at 41.
[365] *Id.* at 42.
[366] *Id.*
[367] *Id.* at 42-42.

it was secured by a first position lien on Mexican land, and it was not disclosed to investors that Lot 47 could not be held by TCC due to Mexican laws[368] or that there was a risk that investors would not be provided any security;

(b) Mogler's qualifications and education were misrepresented;

(c) Salesmen qualifications regarding commissions were misrepresented, as it was shown that fees or commissions were paid to entities that were not registered salesmen or dealers, not officers or directors, and not members of NASD (FINRA) as presented in the investment documents;[369] and

(d) It was not disclosed to investors that Mogler used approximately $345,000 of investor funds, including funds from the TCC 3/08 offering, for personal use.

The Division asserts that these material omissions and material affirmative misrepresentations constitute at least 5 instances of violations of A.R.S. § 44-1991 for the 29 TCC 3/08 investors and, thus, that TCC violated A.R.S. § 44-1991 145 times for this offering.[370]

The Division argues that TCC is liable for the anti-fraud violations related to the TCC 6/10 offering for the following material fraudulent misrepresentations and omissions related to that offering:

(a) Investors were advised the notes would be secured by land that Tri-Core Companies LLC was to purchase, that their investments would be securitized by Mexican land, and that the investments were safe because they would be secured, but were not provided proof that their investment funds were used to purchase land in Mexico or that securitization was provided in any way or informed of any risk that that their investment would not be secured or that title to the Mexican parcel could not be held in fee simple by TCC;[371]

(b) Investors were misinformed about the qualifications of management;[372]

(c) Investors were provided misrepresentations regarding salesmen qualifications regarding commissions;[373] and

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[368] Division Initial Brief at 43-44.
[369] *Id.* at 45.
[370] *Id.* at 46.
[371] *Id.* at 46.
[372] *Id.* at 47.
[373] *Id.*

(d) Investors were not informed that Mogler used approximately $445,000 of investor funds, which included funds from the TCC 6/10 offering, for personal use.[374]

The Division asserts that these material omissions and material affirmative misrepresentations constitute at least 5 instances of violations of A.R.S. § 44-1991 for the 7 TCC 6/10 investors and, thus, that TCC violated A.R.S. § 44-1991 35 times for this offering.

The Division argues that ERCC is liable for the fraud used to offer and sell the ERCC investment on account of the following material fraudulent misrepresentations or omissions:

(a) ERCC misrepresented that the notes were secured because although the ERCC investment documents stated that ERCC was offering Promissory Notes secured by the equipment/compactors purchased, ERCC could not account for the use of investor funds and provided no proof that any equipment had been purchased as promised;[375]

(b) A non-existent entity—ERC Compactors Nevada, LLC—issued a PPM to at least one investor;[376]

(c) The ERCC investment documents made false statements about the qualifications of management;[377]

(d) The ERCC investment documents contained misrepresentations regarding salesmen qualifications regarding commissions, as commission/fees were received by entities that were not officers or directors of ERCC, not registered salesmen or dealers, and not members of NASD (FINRA);[378] and

(e) It was not disclosed to investors that Mogler used approximately $180,000 of investor funds, including investor funds from the ERCC offering, for personal use.[379]

The Division argues that the above omissions and material affirmative misrepresentations constitute at least 5 instances of violations of A.R.S. § 44-1991 for all 10 ERCC investors, and another violation (issuance of a note by a non-existent entity) for one ERCC investor. Thus, the Division argues,

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[374] *Id.* at 48.
[375] *Id.*
[376] *Id.* at 49.
[377] *Id.*
[378] *Id.* at 49-50.
[379] *Id.* at 50.

ERCC violated A.R.S. § 44-1991 over 50 times for this offering.

The Division argues that C&D and TCBD are liable for the fraud to offer and sell the C&D investment on account of the following material fraudulent misrepresentations and omissions related to the C&D offering:

(a) Investors were told orally and in writing that the C&D investment was secured by a first position lien on real estate in Nevada and California and that the investment was safe because it was secured by assets, but investors have not been provided any deeds of trust or other securitizing mechanisms for their investments or any proof that C&D owns any particular land in Nevada and California, and there was testimony that Anthony Salazar was not truthful about the ownership of the Nevada property and that C&D did not own it outright;[380]

(b) The C&D investment documents included misrepresentations regarding salesmen qualifications regarding commissions because, contrary to statements in those documents, individuals and/or entities who received fees/commissions for bringing investors were not officers or directors of the company, registered salesmen or dealers, or members of NASD (FINRA);[381] and

(c) It was not disclosed to investors that Mogler used approximately $445,000 of investor funds, including funds from C&D investors, for personal use.[382]

The Division asserts that the above material omissions and material affirmative misrepresentations constitute at least 3 instances of violations of A.R.S. § 44-1991 for all 11 C&D investors. Thus, the Division states, C&D violated A.R.S. § 44-1991 over 30 times for this offering, and TCBD also violated A.R.S. § 44-1991 over 30 times.

The Division argues that ERCI is liable for fraud related to the ERCI offering for the following material fraudulent misrepresentations and omissions:

(a) The ERCI investment documents list Peter A. Salazar as the only individual in management and state that the success of the business is dependent upon his expertise, but at the time the ERCI investment was offered, ERCI was a manager-managed limited liability company with Mogler as the manager and sole signatory on the bank accounts, and there is no evidence that Peter A.

[380] *Id.* at 51.
[381] *Id.* at 52.
[382] *Id.*

Salazar had any affiliation with ERCI;[383] and

(b) The ERCI investment documents stated that the notes were to be secured by property, equipment, and commodities located in its new facility in Chicago, Illinois, but failed to provide investors with enough information to determine whether their investments would be adequately securitized because the ERCI investment documents stated that operations in Chicago would commence under the name ERC Chicago, LLC; investors holding a note from ERCI may not have the ability to securitize their investments; and the information regarding ownership of the collateral should have been disclosed in order for investors to make an investment decision.[384]

The Division argues that the above material omissions and affirmative misrepresentations constitute at least 2 instances of violations of A.R.S. § 44-1991 made to the ERCI investment offeree. Thus, the Division asserts that ERCI violated A.R.S. § 44-1991 at least twice for this offering.

The Division argues that Mogler has joint and several liability under A.R.S. § 44-1999(B) because he was a controlling person of TCC, TCBD, ERCC and ERCI during the relevant periods.[385] The Division asserts that the Securities Act "attaches vicarious or secondary liability to "controlling persons" as it does to a person or entity that commits a primary violation of §§ 44-1991 or 44-1992."[386] The Division states further that in Arizona, liability under A.R.S. § 44-1999(B) does not require "actual participation" by the alleged control person.[387] The Division asserts that Arizona follows the SEC's definition of "control," which is "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."[388] The Division states that A.R.S. § 44-1999(B) imposes "presumptive control liability on those persons who have the power to directly or indirect control the activities of those persons or entities liable as primary violators of § 44-1991, and the evidence need

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[383] *Id.* at 52-53.
[384] *Id.* at 53.
[385] Section 44-1999(B) of the Securities Act provides: "Every person who, directly or indirectly, controls any person liable for a violation of the § 44-1991 or § 44-1992 is liable jointly and severally with and to the same extent as the controlled person to any person to whom the controlled person is liable unless the controlling person acted in good faith and did not directly or indirectly induce the act underlying the action."
[386] *Facciola v Greenberg Traurig, LLP*, 781 F. Supp. 2d 913, 922-23 (D. Ariz. 2011); *see also Eastern Vanguard Forex Ltd. v. Ariz Corp. Com'n,* 206 Ariz. 399, 412, 79 P.3d 86, 89 (App. 2003).
[387] *Eastern Vanguard*, 206 Ariz. at 411., 79 P.3d at 98.
[388] *Id.* at 412

only show that the person targeted as a controlling person had the legal power, either individually or as part of a control group, to control the activities of the primary violator.[389]

The Division asserts that in this case, Mogler was the manager of TCC, a manager-managed limited liability company, during the time period that the TCC 2/08, 3/08, and 6/10 offerings were offered and sold, and that Mogler was a signatory on the investment documents for the TCC 2/08, 3/08, and 6/10 offerings, and on the TCC bank accounts. In addition, Mogler participated in preparing the content for the TCC 2/08, 3/08, and 6/10 offering PPMs.[390] Thus, the Division argues, it is clear that Mogler had the power to control, directly or indirectly, the primary violator, TCC, for these three offerings and is therefore liable for the anti-fraud violations by TCC.[391]

The Division asserts that Mogler has the same control person liability for TCBD for the TCMLD and the C&D offerings. Mogler was the manager of TCBD, a manager-managed limited liability company, during the time that the TCMLD and C&D investments were offered and sold, and was the signatory for TCBD on the consulting agreements with both TCMLD and C&D that allowed TCBD to act as agent for their issuers for these two offerings. Mogler was a signatory on the TCBD bank accounts during the time of these two offerings and received the bank statements at his personal residence. The Division states it is significant that Mogler controlled the bank accounts in which investor funds were deposited for these offerings. For the C&D offering, Mogler signed the C&D investment documents on behalf of Peter A. Salazar Jr. for C&D, pursuant to what was represented to investors as a "limited power of attorney." Thus, the Division argues, Mogler had the power to control, directly or indirectly, the primary violator, TCBD, who was acting as a dealer for these two offerings, and is therefore liable for the anti-fraud violations by TCBD.[392]

The Division also argues that Mogler is liable as the controlling person of both ERCC and ERCI for those respective offerings. The Division states that both ERCC and ERCI were manager-managed limited liability companies during the relevant periods, with Mogler as manager. Mogler was a signatory on behalf of ERCC and ERCI on their respective investment documents, and was the sole

[389] Division Initial Brief at 54.
[390] HT at 1058 – 1060.
[391] Division Initial Brief at 55.
[392] Division Initial Brief at 55.

signatory on both companies' bank accounts. The Division asserts that Mogler had the power to legally control both ERCC and ERCI, the primary violators for these two offerings, and is jointly liable for the anti-fraud violations associated with these offerings.[393]

Based on the evidence admitted at the hearing, the Division recommends that the Commission do the following:[394]

(a) For the TCMLD offering, pursuant to A.R.S. §§ 44-2032(1) and 44-1999(B), order TCBD and Mogler, jointly and severally, to pay restitution in the amount of $1,165,000, plus pre-judgment interest from the date that each investor invested (as set forth in Exhibit S-219), with pre-judgment interest to be calculated at the time of judgment under A.R.S. § 44-1201;

(b) For the TCMLD offering, pursuant to A.R.S. §§ 44-2036(A) and 44-1999(B), order TCBD and Mogler, jointly and severally, to pay an administrative penalty of not more than $5,000 for each violation of the Securities Act related to the TCMLD offering, with the Division's recommendation being a total administrative penalty of $275,000, based on over 500 violations of various provisions of the Securities Act in this offering;

(c) For the TCC 2/08 offering, pursuant to A.R.S. § 44-2032(1) and 44-1999(B), order TCC and Mogler, jointly and severally, to pay restitution in the amount of $335,000, plus pre-judgment interest from the date that each investor invested (as set forth in Exhibit S-220), with pre-judgment interest to be calculated at the time of judgment under A.R.S. § 44-1201;

(d) For the TCC 2/08 offering, pursuant to A.R.S. §§ 44-2036(A) and 44-1999(B), order TCC and Mogler, jointly and severally, to pay an administrative penalty of not more than $5,000 for each violation of the Securities Act related to the TCC 2/08 offering, with the Division's recommendation being a total administrative penalty of $50,000;

(e) For the TCC 3/08 offering, pursuant to A.R.S. §§ 44-2032(1) and 44-1999(B), order TCC and Mogler, jointly and severally, to pay restitution in the amount of $1,158,832, plus pre-judgment interest from the date that each investor invested (as set forth in Exhibit S-221), with pre-judgment interest to be calculated at the time of judgment under A.R.S. § 44-1201;

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[393] *Id.* at 55-56.
[394] *Id.* at 58-61.

(f) For the TCC 3/08 offering, pursuant to A.R.S. §§ 44-2036(A) and 44-1999(B), order TCC and Mogler, jointly and severally, to pay an administrative penalty of not more than $5,000 for each violation of the Securities Act related to the TCC 3/08 offering, with the Division's recommendation being a total administrative penalty in the amount of $100,000;

(g) For the TCC 6/10 offering, pursuant to A.R.S. §§ 44-2032(1) and 44-1999(B), order TCC and Mogler, jointly and severally, to pay restitution in the amount of $370,000, plus pre-judgment interest from the date that each investor invested (as set forth in Exhibit S-222), with pre-judgment interest to be calculated at the time of judgment under A.R.S. § 44-1201;

(h) For the TCC 6/10 offering, pursuant to A.R.S. §§ 44-2036(A) and 44-1999(B), order TCC and Mogler, jointly and severally, to pay an administrative penalty of not more than $5,000 for each violation of the Securities Act related to the TCC 6/10 offering, with the Division's recommendation being a total administrative penalty in the amount of $30,000;

(i) For the ERCC offering, pursuant to A.R.S. §§ 44-2032(1) and 44-1999(B), order ERCC and Mogler, jointly and severally, to pay restitution in the amount of $880,000, plus pre-judgment interest from the date that each investor invested (as set forth in Exhibit S-223), minus the $47,477 repaid to specific investors, with pre-judgment interest to be calculated at the time of judgment under A.R.S. § 44-1201;

(j) For the ERCC offering, pursuant to A.R.S. §§ 44-2036(A) and 44-1999(B), order ERCC and Mogler, jointly and severally, to pay an administrative penalty of not more than $5,000 for each violation of the Securities Act related to the ERCC offering, with the Division's recommendation being a total administrative penalty in the amount of $50,000;

(k) For the C&D offering, pursuant to A.R.S. §§ 44-2032(1) and 44-1999(B), order C&D, TCBD, and Mogler, jointly and severally, to pay restitution in the amount of $735,000, plus pre-judgment interest from the date that each investor invested (as set forth in Exhibit S-224), minus the $196,520.67 repaid to specific investors, with pre-judgment interest to be calculated at the time of judgment under A.R.S. § 44-1201;

(l) For the C&D offering, pursuant to A.R.S. §§ 44-2036(A) and 44-1999(B), order TCBD and Mogler, jointly and severally, and C&D, individually, to pay an administrative penalty of

not more than $5,000 for each violation of the Securities Act related to the C&D offering, with the Division's recommendation being a total administrative penalty in the amount of $25,000 for TCBD and Mogler and a total administrative penalty in the amount of $25,000 for C&D;

(m) For the ERCI offering, pursuant to A.R.S. §§ 44-2036(A) and 44-1999(B), order ERCI and Mogler, jointly and severally, to pay an administrative penalty of not more than $5,000 for each violation of the Securities Act related to the ERCI offering, with the Division recommendation being a total administrative penalty in the amount of $10,000;

(n) Pursuant to A.R.S. § 44-2032(1), order TCBD, TCC, ERCC, ERCI, C&D, and Mogler to cease and desist from further violations of the Securities Act; and

(o) Order any other relief deemed appropriate.

B. Positions of Respondents ERCC, ERCI, and C&D

Respondents ERCC, ERCI, and C&D did not submit post-hearing briefs.

C. Position of Tri-Core Respondents

Tri-Core Respondents argue that under federal law, securities may not be sold except by a registered broker-dealer, unless an exemption applies. They assert the "issuer exemption" allows directors and officers of a company to sell its securities without registering if (1) the selling persons are officers, directors, or full-time employees who perform substantial duties for the Company other than selling these securities; and (2) the selling persons are not paid compensation for their sales efforts (*i.e.*, they can continue to receive their normal compensation, but no commissions or bonuses for selling the stock).[395] Tri-Core Respondents assert that because of the safe harbor and offering exemption, they chose Rule 506 of Regulation D to offer their PPMs.[396]

They state that to preserve the safe harbor and private offerings exemptions of Rule 506 of Regulation D, they were careful about disclosure and paid attention to ensuring that:

(a) No public offering took place, in that the terms of the companies' PPMs or an announcement of its PPMs were not advertised by an article, notice, or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio;

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[395] Tri-Core Respondents' Brief at 2.
[396] *Id.* at 37.

(b) Public seminars were educational;

(c) Readers would know that their securities were restricted;

(d) Language regarding different risks was included throughout the PPMs;

(e) Language in the PPMs urged readers to consult with advisors;

(f) Readers were urged to ask questions numerous times in the PPMs; and

(g) Readers were asked to visit any properties discussed in the PPMs.[397]

They argue that there was no registration violation under A.R.S. § 44-1841 with respect to the TCMLD offering; the TCC 2/08, TCC 3/08, and TCC 6/10 offerings; the ERCC offering; the ERCI offering, and the C&D offering because they qualify for exemption under the "issuer exemption" under federal law, and Mogler was empowered to sell the securities as an officer of the company who did not receive commissions for the sales.[398]

1. TCMLD Investment

Responding to the charge that "Tri-Core" has not held any deeds to "Lot 5," and that investors were not provided a deed of trust or other mechanism to securitize their notes with any land in Mexico purchased by "Tri-Core," and the charge that it was not disclosed to investors that the same "Lot 5" was part of two separate offerings, Tri-Core Respondents state: "This private placement memorandum was issued in error. The single note holder of this private placement memorandum has relied on Mr. James Stevens for communication regarding his investment."[399]

In response to the charge that the TCC 3/08 PPM and promissory notes stated that the notes are secured in the land that TCC purchases and will be senior debt of the maker and secured by the property, Tri-Core Respondents state that the "land is properly titled to a Mexican company that is owned by Tri-Core members" and "is secured by a deed, issued in accordance with Mexican law."[400] They state that "[i]n accordance with verbiage in the private placement memorandum, the deed is being held by Tri-Core Companies for the benefit and security of the note holders as acknowledgment of its senior debt status."[401]

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[397] *Id.* at 37.
[398] *Id.* at 2-4, 8-9, 12-14, 15-19, 21-23, 38.
[399] *Id.* at 3.
[400] *Id.*
[401] *Id.*at 5.

Contrary to the charge that Tri-Core has not held any deeds to "Lot 47" and investors were not provided with securitization of their notes, the Tri-Core Respondents assert that "Tri-Core does hold the deed to Lot 47 . . . for the benefit and security of the note holders," as stated in the PPM.[402]

Respondents argue that the allegation that the TCC 3/08 investment was publicly advertised using webinars, websites, and seminars presented by Buckley is an incorrect assumption. They assert that the terms of the company's PPM or an announcement of its PPM were not advertised by an article, notice, or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio. Respondents argue that:

(a) Stating a widely held meaning of an alternative investment does not violate the advertising requirement of Rule 506 of Regulation D;

(b) Stating that an investment that is secured by land in Mexico, which is properly titled, is safe is a statement of fact, as well as an explanation of the company's business practices, and it is widely accepted, especially in Mexico, that any property that is titled correctly and held for the benefit of note holders is a safer investment than property that has issues on its title;

(c) It is incorrect to assume that public advertising has occurred when seminars are being offered for educational purposes, without mentioning any PPM or the specifics of an existing private placement offering;

(d) An educational seminar on common ways to own land in Mexico does not constitute a public offering;

(e) Listing a company's name on a web page does not constitute a public offering;

(f) The AIC website product information "required requested password" for any documents and was not openly available to the general public;

(g) No PPM was posted on any website;

(h) It is important to consider the preexisting relationship that existed with the note holders to dispel general advertising or solicitation views and opinions, and that potential note holders were family and friends;

[402] *Id.* at 5.

(i) The number of note holders for the PPMs, because it was so small, confirms that general advertising and solicitation did not occur;

(j) Discussing the company's business of buying property in Sonora, Mexico does not violate the advertising section of Regulation D Rule 506 requirements; and

(k) Webinars and seminars were for educational purposes, and did not go into the particulars of the private placement offering, and the website offered educational seminars.[403]

2. TCC 6/10 Investment

Tri-Core Respondents assert that the TCC 6/10 PPM states that the promissory notes "are" or "will be secured" by the "land Tri-Core Companies LLC purchases" and that by using the word "purchases," it was clearly stated and not misleading that no land had been purchased and, further, not possible to name a specific parcel.[404] Tri-Core Respondents state that the only mention of the property that would be purchased was that the property would be located in the upper Sonoran Peninsula, and this is exactly where the paid-for property for this PPM is located. Tri-Core Respondents state that no representation was ever made to contradict these statements.

In Response to the allegation that investors were not provided a deed of trust or other mechanism to securitize their notes, Tri-Core Respondents state that Parcel 3 located in El Golfo de Santa Clara, Mexico has been paid for and is located on the coastline of the upper Sonoran Peninsula in accordance with the verbiage found in the PPM. They state further that this property is in the process of being titled in accordance with Mexican law "in favor of Tri-Core" for the security and collateral of the note holders.[405]

Tri-Core Respondents argue that A.R.S. § 44-1844(A)(1) provides a statutory exemption from registration when an issuer's private offerings are exempt, and that any necessary and appropriate paperwork was filed by counsel.[406]

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[403] *Id.*at 5-7.

[404] *Id.* at 9. Respondents are responding to para 97 of the Notice, which states: "Although the 6/1/10 TCC PPM and promissory notes stated that the promissory notes 'are' or 'will be secured' by the 'land Tri-Core Companies LLC purchases', the land is not identified."

[405] *Id.* at 10.

[406] *Id.*

3. ERCC Investment

Respondents state that the PPM was offered pursuant to the provisions of Rule 506 of Regulation D under the Securities Act of 1933. Even though the notes were issued by ERCC, the Respondents explain that the PPM referred to the business plan of "ERC of Nevada LLC" because that business plan gave great insight into ERCC, which was a "divisional venture" of ERC of Nevada LLC.[407] In addition, Respondents state that because of a lawsuit in Nevada challenging ownership of C&D Construction Services (now ERC of Nevada), Respondents were "instructed not to take any action on ERC's behalf," including securing equipment.[408]

Responding to the charge that the ERCC investment was publicly advertised by AIC, Respondents state that "Tri-Core" did not publicly advertise any of the particulars of their offerings, as the radio show specifically contained a disclaimer, which was repeated several times, stating that the show was not selling or soliciting the sale of securities. Respondents assert that discussing the business of the company, such as recycling, does not violate the advertising section of Regulation D Rule 506 requirements. Further, Respondents stated, the seminars were for educational purposes, discussing recycling, and did not go into the particulars of the private placement offering.[409]

4. ERCI Investment

Respondents also argue that the ERCI investment was exempt under Rule 506 of Regulation D, such that as an officer of the company, Mogler was empowered to sell the investment.[410]

Tri-Core Respondents state that ERCI never raised capital or issued a PPM, as it was a company formed solely to be used as an ownership company.[411] Further, Tri-Core Respondents state that since TCBD was hired by ERCI to assist in the growth of the company, Mogler had the contractual right to sign notes on behalf of ERCI.

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[407] *Id.* at 11. Respondents stated that ERC Compactors LLC is a new division of ERC, and "fell under ERC of Nevada because it was a divisional venture and augmented ERC of Nevada's LLC's recycling business. Because of this structure, the business plan of ERC Nevada LLC was used. ERCs of Nevada's business plan discussed recycling of commodities, such as cardboard, and also gave great insight in the company."

[408] *Id.* at 12.

[409] *Id.* at 13.

[410] *Id.* at 14.

[411] *Id.* at 14-15. This statement is in response to the claim in the Notice at para 126: "The 12/2/11ERCI PPM states,'[d]elivery of the [subscription documents], together with a check to be addressed to the Company as follows: ERC INVESTMENTS LLC, c/o Arizona Investment Center, 8800 E. Chaparral Road, Suite 270, Scottsdale, AZ 85250."

Tri-Core Respondents claim they did not advertise the PPMs in articles, media, or broadcast and reject inferences that because an alternative investment or the idea of investing in land in Mexico were discussed on a radio show or in educational seminars that it constituted public advertising.[412] They argue that listing a company's name on a web page is not a public offering, and claim that the AIC website product information was password protected and not openly available to the general public, that no PPM was posted on any website, and that the Internet was not used to advertise or announce that the company was selling stock or seeking investors.[413] Tri-Core Respondents argue that preexisting relationships with the noteholders "must be taken into consideration to dispel any general advertising or solicitation views and opinions."[414] Tri-Core Respondents also claim that at the hearing, disclaimers about the company not selling securities were not heard because complete transcripts of the radio broadcast were not read. Further, they argue that because the number of note holders was so small, it confirms that general advertising and solicitation did not occur.[415]

5. Tri-Core Respondents' Response to Fraud Allegations

With respect to allegations that they did not use investor funds to purchase land in Mexico as referenced in the investor material, Tri-Core Respondents state: "When an issue concerning the title on Lot 5 was found out, TCBD immediately explored and addressed this issue and stopped raising money for this property. Mr. Stevens notified the note holders."[416] They state that Mr. Stevens formed a committee of investors that is working with him to resolve the issue.[417] They claim that investors signed a letter acknowledging the issue and gave Mr. Stevens an unlimited extension to deliver the property.[418] Regarding failure to disclose outstanding tax liens against Mr. Stevens, they state that it was Mr. Stevens's responsibility to disclose that information.

In response to alleged fraud from not providing investors with a deed of trust or other mechanism to securitize the notes that had been represented as secured by property in Mexico; not disclosing that Lot 5 had also been offered and sold to investors in another offering; and representing

[412] Respondents Brief at 20.
[413] *Id.*
[414] *Id.* at 21.
[415] *Id.*
[416] *Id.* at 23-24.
[417] *Id.* at 24.
[418] *Id.* at 24.

that the TCC 2/08 investment might be sold by registered broker/dealers who are members of NASD (FINRA) and qualified licensed personnel, Tri-Core Respondents state that the TCC 2/08 PPM was issued in error and that "[t]he single note holder of this private placement memorandum has relied on Mr. James Stevens for communication regarding his investment in Lot 5."[419]

With respect to alleged fraud related to the TCC 3/08 investment, Tri-Core Respondents state that the purchase of Lot 47 was presided over and completed by two Mexican attorneys; that a Mexican Notario presided over the actual transfer of title "thereby insuring a legal transfer of title"; and that because some of the note holders did not want to be directly on title, it was decided that the best way to protect note holders' interests in Lot 47 was to have them registered with the Mexican Government in their registry, for which steps are being taken to complete the process.[420] They state that title to Lot 47 is in the name of a Mexican corporation because foreigners are not allowed to hold title to land where Lot 47 is located. They claim there was no representation in the PPM regarding what entity would hold title for Lot 47 and that, at the time the PPM was issued, how the property would be titled was still in question.[421]

With respect to the claim of fraud in connection with who would be selling the TCC 3/08 investment, Tri-Core Respondents refer to the "issuer exemption" of Rule 506 of Regulation D and state that "Tri-Core" disclosed that it had an option of entering into a Participating Dealer Arrangement if it chose to do so, and did not state that it had entered into such an arrangement or contemplated entering into such an arrangement.[422]

With respect to alleged fraud stemming from representing alternative investments in Mexican land as safe because secured, Tri-Core Respondents assert that "discussing the safety of investing in property that is legally titled and the fact that the title is being held by the company as security for the note holders is not a fraudulent statement" because how the title would be held was clearly stated in the PPM.[423]

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[419] *Id.* at 27-29.
[420] *Id.* at 29.
[421] *Id.* at 30-31.
[422] *Id.* at 32-34.
[423] *Id.* at 34-35. Tri-Core Respondent stated that the PPMs provide that (A) the notes being offered in the PPM are "secured by the land Tri-Core Companies LLC purchases" and that TCC will "establish an administration account which will hold

In response to the alleged fraud from representing that the TCC 6/10 investors would be in a first secured position, Tri-Core Respondents state: "When the property, Lot 3, is purchased in accordance with Mexican law, the note holders will be in a first secured position. Since the property cannot be sold without paying off the note holders, they are protected."[424] The Tri-Core Respondents claim that title transfer will conform to Mexican law and that note holders will be notified when the transfer is complete.

With respect to alleged fraud from representing that the ERCC Investment would be safe and secured by the equipment purchased, but failing to provide investors with a mechanism to securitize their notes, Tri-Core Respondents claim that because of a lawsuit challenging ownership of C&D (now ERC of Nevada), they were instructed "not to take any action on ERC[']s behalf[,] including securing equipment."[425]

Tri-Core Respondents claim that the testimony of some of the witnesses at the hearing was incomplete or inaccurate, as follows:

(a) Regarding Mr. Sherman, they claim that his investor questionnaire was incomplete because Mr. Sherman had told Mr. Buckley that completing the questionnaire on his copy was not necessary.[426] They assert that despite his testimony, Mr. Sherman was a friend and business partner of Mr. Polanchek. They claim that Mr. Sherman failed to state that he approached ERC Chicago to invest as an owner, not a note holder, and that his notes were marked satisfied in return for an equity ownership interest in ERC Chicago.[427] They also assert that Mr. Sherman's mother (another note holder) is a wealthy and sophisticated real estate investor who also requested to invest in ERC Chicago as Mr. Sherman did. They claim that Mr. Quinn, who is Mr. Sherman's business partner, is still operating ERC Chicago and has reported that the business is doing well.[428]

(b) Regarding Mr. Wong, they claim that Mr. Wong failed to state that he had numerous conversations with Mr. Stevens about Lot 5 and at all times had access to Mr. Stevens. They

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the title to the property until all note holders will be paid in full"; and (B) the notes will be "senior debt of the Maker and secured by the property." *Id.* at 34.

[424] *Id.* at 35.

[425] *Id.* at 36.

[426] *Id.* at 38.

[427] *Id.* at 38-39.

[428] *Id.* at 39.

also state that the PPM Mr. Wong signed was issued in error and that Mr. Wong is a sophisticated investor who is also an accredited financial planner.[429]

(c) The Tri-Core Respondents also claim that they could not challenge a rebuttal witness who testified to financial hardship but, they allege, stated out of court that she could wait for Lot 3 to be sold.[430]

The Tri-Core Respondents claim that the "company has paid for Lot 3 and is in the process of having it titled correctly via Mexican law" and that "[a]s with Lot 47, the company is committed to selling the property and repaying the note holders."[431]

Tri-Core Respondents allege that all charges of fraud are false and cite to the anti-fraud provision of Rule 10b-5 under the Securities and Exchange Act, which they assert states as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> A) To employ any device, scheme, or artifice to defraud,
> B) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
> C) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.[432]

They claim that for Rule 10b-5 to be invoked, there must be "intentional fraud or deceit," but that in this case there was no scheme to defraud, as shown by language in the PPM that note holders were advised to seek counsel and had been given an opportunity to review the investment with counsel or an investment advisor, that the notes would be "secured by the land Tri-Core Companies LLC purchases," that an administration account would hold title to the property until all note holders are paid, and that "[d]eeds would be held by Tri-Core Companies for the benefit of the note holders."[433] They argue there is nothing in the PPMs stating that the properties would be in the name of Tri-Core Companies LLC. They state that all properties that are in the process of being purchased have been, or will be, titled correctly under Mexican law at the advice and direction of Mexican attorneys, and reiterate that Tri-Core could not legally, under Mexican law, own property in the restricted zone under

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[429] *Id.*
[430] These statements are not in the record.
[431] *Id.* at 40.
[432] *Id.* at 40.
[433] *Id.* at 41.

its name. They argue that "[c]ompany employees" are allowed to sell notes as officers or directors of the company for a PPM issued under Rules 506 of Regulation D and that "[n]o public fraudulent statements were made."[434]

D. The Division's Reply to Tri-Core Respondents' Brief

1. Tri-Core Respondents failed to demonstrate an exemption from registration.

The Division argues that the issuers did not meet their burden of demonstrating compliance with Rule 506 or A.R.S. § 44-1844(A)(1), and thus, there is no exemption that would apply to excuse registration for any of the securities.[435]

The Division argues that under the Securities Act, the burden of establishing an exemption from registration is on the party claiming it,[436] and that the Arizona Supreme Court has held that there must be strict compliance with all the requirements of the exemption statute.[437]

The Division acknowledges that Regulation D of the Securities Act of 1933 outlines two exemptions and a "safe harbor" with respect to Section 4(2) of the Securities Act of 1933, but asserts that to take advantage of the "safe harbor," an issuer must meet all of its requirements.[438] The Division asserts that there must be actual compliance with Rule 506 at the federal level before state registration requirements can be preempted.[439] The Division states that actual compliance at the federal level is not a state-specific inquiry, and instead must include analysis of all offers and sales for that particular offering.[440] The Division asserts that for a Rule 506 private offering exemption, all offers and sales must satisfy the terms and conditions of 17 C.F.R. §§ 230.501 and 230.502, and substantive purchaser limitations apply.[441]

The Division asserts that an offering pursuant to Rule 506 must comply with Rules 501 through 506 of Regulation D, and an issuer must establish that both: (1) the issuer does not use general solicitation to market the securities (Rule 502(c)); and (2) the issuer sells its securities to no more than

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[434] *Id.* at 41.
[435] Division Reply Brief at 2.
[436] A.R.S. § 44-2033.
[437] *State v. Baumann*, 125 Ariz. 404, 411, 610 P.2d 38, 45 (1980).
[438] Division Reply Brief at 3, emphasis in original.
[439] *Id.* (*citing Brown v. Earthboard Sports USA*, 481 F.3d 901 (6th Cir, 2007)).
[440] *Id.* at 3.
[441] Division Reply Brief at 3-4; *see* 17 CFR § 230.506.

35 non-accredited investors, who are sophisticated purchasers, and an unlimited number of accredited investors (Rule 506(b)(2)).[442] Further, the Division asserts, when an issuer makes an offering pursuant to the registration exemptions provided by A.R.S. § 44-1844(A)(1) or A.A.C. R14-4-126, the issuer can conduct no "general solicitation" or "general advertising" in connection with the sale or these securities.[443]

2. General solicitation was used in all offerings.

The Division argues that general solicitation was used in all offerings, and thus, Tri-Core Respondents cannot claim a Rule 506 or A.R.S. § 44-1844(A)(1) exemption.[444] The Division notes that Rule 502(c) provides that "neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or advertising . . .", and that general solicitation or advertising includes, but is not limited to "any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio" and "[a]ny seminar or meeting whose attendees have been invited by any general solicitation or general advertising."[445]

In this case, the Division states that it presented evidence that the TCC 3/08 offering, TCC 6/10 offering, and C&D offering were advertised on a public radio broadcast called the Investment Roadshow.[446] Further, the Division notes, the referral source listed on the investor lists produced by Tri-Core Respondents for the TCMLD offering shows that several investors were solicited by radio/magazine,[447] and one of the investors in the TCMLD offering confirmed that he learned about the investment opportunity in a magazine.[448] The Division states that another investor testified that TCC solicited investors in the TCC 3/08 investment at a Los Angeles "vendor fair."[449] The Division

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[442] Division Reply Brief at 3-4.
[443] Division Reply Brief at 4. The Division notes that the Securities Act does not include a definition of general solicitation or general advertising. A.R.S. § 44-1844(A)(1) and A.A.C. R14-4-126 contain provisions similar to federal law. The Division states that in accordance with A.R.S. § 44-1815, we look to federal law for interpretative guidance. (*See also, e.g., Vairo v. Claydoen*, 153 Ariz. 13, 734 P.2d 110 (App 1987).)
[444] Division Reply Brief at 4.
[445] 17 C.F.R. 230.502 (c).
[446] Exs S-21, S-23, S-26, S-38, S-44, S-47, S-221, S-224, S-227, S-229, S-230, S-255 (a), (b) & (c); Tr. at 207=208, 208-212, 224-229, 231-232, 408 – 413, 416-424, 426-444, 535-536.
[447] Ex S-50.
[448] HT at 85.
[449] HT at 633.

states that the investor list provided by Tri-Core Respondents also shows that several investors in the C&D offering were solicited by radio, and that at least one investor confirmed this.[450] The Division asserts that although the Tri-Core Respondents testified that the radio broadcasts did not offer any particular investment to listeners, the claim is contradicted by the radio broadcasts themselves, which were admitted in their entirety in audio and transcribed forms.[451] The Division notes that the radio broadcasts repeatedly referenced investments available in Mexican land and recycling, made representations about the safety and security of the investments, told listeners how to use a self-directed IRA to invest in the companies, and invited listeners to call the AIC or go to the AIC website to schedule an appointment or sign-up for a seminar or webinar to learn about the opportunities.[452]

The Division points out that Mr. Buckley testified that offerees attended seminars, presentations, and webinars, in Arizona and out of state, in which he presented the investment opportunities.[453] Contrary to the Tri-Core Respondents' statement in their brief that the seminars were "educational" and did not address the specifics of the offerings, the Division argues, Mr. Buckley's testimony confirmed that the investments were discussed.[454] Further, the Division asserts that testimony and documents admitted at the hearing confirmed that investors learned about the investment opportunities through seminars/presentations/meetings.[455]

The Division asserts that in determining whether a general solicitation has occurred under Rule 506 and A.R.S. § 44-1844(A)(1), the focus is on the relationship between the issuer and the potential investor.[456] The Division states that in making this determination, the SEC has focused on whether the issuer, or dealer acting on behalf of the issuer, had a relationship with the offeree that was both "substantive" and "preexisting."[457] The Division argues that the record indicates that when offerees learned of the investment opportunities through the radio, magazines, or vendor fairs or attended meetings, seminars, presentations, and webinars, they had no preexisting relationship with the

[450] Ex S-35; HT at 253-354.
[451] Exs S-227, S-229-S231, S-255.
[452] *Id.*
[453] HT at 533-535.
[454] Division Reply Brief at 5.
[455] Ex S-115, S-139, S-176; HT at 102-103, 167-168, 478-493, 503-505, 589-590, 633, 652-653, 675-676, 688.
[456] Division Reply Brief at 6.
[457] *Woodtrails-Seattle Ltd.* SEC No-Action Letter, 1982 WL 29366 (Aug. 9, 1982), *E.F. Hutton Co.*, SEC no-Action Letter, 1985 WL 55680 (Dec. 3, 1985).

issuers.[458]

The Division states that one way an issuer can establish the "substantive" element required under Rule 502 is by presenting evidence that only accredited investors (as defined in Rule 501(a)) were targeted for each offering.[459] The Division argues that the Tri-Core Respondents offered no evidence at hearing or argument in their Brief to establish this element and that, in fact, the evidence established that unaccredited investors were solicited and sold the investments in all of the offerings at issue.[460]

The Division asserts that while investor questionnaires that allow the issuers to evaluate a prospective offeree's sophistication and financial circumstances may be used to establish the "substantive" element, the questionnaire must be prospective, and cannot accompany the offering documents at issue.[461] The Division asserts that in this case, although investor questionnaires accompanied many of the investment documents for each offering, there is no evidence that they were evaluated pre-offering and, indeed, many of the questionnaires were dated on the same date as the investment documents were executed.[462] In addition, the Division notes that many investors had no investor questionnaire, incomplete questionnaires, or questionnaires that were not filled out at all.[463]

In addition, the Division argues that the Tri-Core Respondents presented no evidence at hearing that investors and offerees had preexisting business relationships with the issuers.[464] The Division asserts that to satisfy this element, the business relationship had to have preexisted the time when the offering was being made.[465] The Division argues that as the parties asserting the exemption, it is the Tri-Core Respondents' burden to establish the preexisting business relationship between the issuers and all investors and offerees, and argues that not only did they not meet their burden, the evidence

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[458] Division Reply Brief at 6.
[459] *Id.* at 6-7.
[460] Exs S-35, S-38, S-50, S-141-143, S-145-S-146, S-148-S-150, S-154- S159, S-162, S-172, S-176, S-191-S-193, S-208, S-210-S-213, S-234; Tr. at 478, 505, 557-558, 638, 656, 680.
[461] Division Reply Brief at 6 (citing *H.B. Shaine & Company, Inc.*, SEC No-Action Letter, 1987 WL 107907 (May 1, 1987)).
[462] Division Reply Brief at 6.
[463] *See, e.g.* Exs S-52, S-105, S-108, S-132, S-165, S-172, S-184, S-185, S-192, S-193, s-195, S-197, S-208, S-210, s-211, S-213.
[464] Division Reply Brief at 7.
[465] *See E.F. Hutton Co.*, SEC No-Action Letter, 1985 WL 55680.

established the opposite.[466] The Division cites Mr. Stevens's admission that he did not know the investors that invested in TCMLD, that they had no preexisting relationship with TCMLD before investing, and that he did not know how they were solicited.[467] In addition, the Division states, multiple investors testified that they had no preexisting relationship with the issuers.[468] The Division asserts that even with the ERCI offering, in which one offer for sale was made, the Tri-Core Respondents presented no evidence regarding accreditation or sophistication of the offeree or of a preexisting relationship between ERCI and the offeree.[469] The Division states that from Tri-Core Respondents' Brief, it appears they believe there is a "friends and family" exemption, something that the Division asserts is not supported by the language of Rule 506 or A.R.S. 44-1844(A)(1) and for which the Tri-Core Respondents failed to offer any legal support.

3. Tri-Core Respondents cannot establish unaccredited investors were sophisticated.

The Division argues that not only can the Tri-Core Respondents not meet the initial threshold of a Rule 506 and A.R.S. 44-1844(A)(1) exemption because they used general advertising and solicitation, but they also cannot meet the second requirement of Rule 506 that securities for each offering can be sold only to accredited investors and no more than 35 non-accredited investors who are sophisticated purchasers.[470]

The Division states that a sophisticated investor, either alone or with a qualified purchaser representative, "has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment."[471] Thus, according to the Division, in order to obtain federal exemption, and qualify to preempt any state registration requirement, all investors much be evaluated under this requirement, not just those in or from Arizona.[472]

The Division asserts that each offering included unaccredited investors and that the Tri-Core

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[466] Division Reply Brief at 7.
[467] HT at 1022-1023.
[468] HT at 478, 505, 558, 572, 651, 677, 689.
[469] Division Reply Brief at 7.
[470] Division Reply Brief at 8; See 17 C.F.R. 230,506(b)(2)(ii).
[471] *Id.* and see *also Mark v. FSC Sec. Corp.*, 870 F.2d 331, 334 (6th Cir. 1989)(Respondent "is required to offer evidence of the issuer's reasonable belief as to the nature of each purchaser.")
[472] Division Reply Brief at 8.

Respondents failed to provide any evidence to establish that all unaccredited investors for each offering were sophisticated at the time of investment.[473] The Division asserts that although it had no obligation to disprove sophistication for unaccredited investors, there was evidence that unaccredited investors were not sophisticated. The Division cites testimony of Mr. Stevens that he did not know the investors that invested with TCMLD, and argues that as a result, he could not provide substantive information about the unaccredited investors. The Division also cites the testimony of Mr. Ploof that he had never invested in Mexican land before, and states that there was no indication in the unexecuted investment questionnaires from Mr. Ploof or unaccredited investor Ms. Barnes that they were "sophisticated purchasers" for the Mexican land investment.[474]

The Division notes that although the investor list for the TCC 2/08 offering shows that David Hickok, Martha Hansen, Kurt Senser, and Warren and Sue Schumacher were unaccredited investors, but their investment documents have unexecuted investor questionnaires, and there was no evidence presented at hearing that these individuals were sophisticated purchasers.[475] The Division states that the TCC 3/08 offering also included multiple unaccredited investors without evidence of their sophistication. The Division points to various investor questionnaires that asked the investor to indicate a profession, but did not request or offer any further information that would allow an analysis of sophistication.[476] Furthermore, some investors listed on the TCC 3/08 investor list have no indication as to whether they were accredited or not; and the Division asserts that the Tri-Core Respondents presented no evidence at hearing concerning these individuals' accreditation or sophistication.[477] The Division notes that for the TCC 6/10 offering, unaccredited investor Jessica Hogan testified that she had never invested in Mexican real estate before, and nothing in the other unaccredited investors' questionnaires (one of which is blank) indicates that they were sophisticated.[478] The Division asserts that the TCC-supplied investor list for the 6/10 offering shows investors for which there is no indication as to whether they were accredited and no evidence presented at hearing concerning their accreditation

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[473] Division Reply Brief at 8.
[474] Exs S-50, S-105, S-108, HT at 478.
[475] Division Reply Brief at 9; Exs S-128, S-132, S-135, S-220; HT at 491-501.
[476] Ex S-141, S-142, S-148, S-150.
[477] Division Reply Brief at 9; Ex S-44, *see e.g.* investors Wixson, Mays and Singer.
[478] Exs S-184-S-188, S-122; HT at 680.

and sophistication.[479] In addition, the Division notes, the ERCC offering investor list shows 26 unaccredited investors, and there was no evidence presented at hearing for several of these unaccredited investors to show their sophistication; the C&D investor list shows over 10 investors that were unaccredited, again with no evidence presented at hearing indicating their sophistication, or that they were indeed accredited; and the Tri-Core Respondents presented no evidence one way or the other as to accreditation or sophistication for the ERCI offeree.[480]

The Division argues that Rule 230.502(b)(1) requires that certain information be furnished to unaccredited investors at a reasonable time prior to the sale, including the same kind of information required in Part 1 of a registration statement under the Securities Act and a financial statement of the issuer.[481] The Division argues that the Tri-Core Respondents submitted no evidence that the issuers for the offerings complied with this provision for any of their unaccredited investors and, as a result, fail to qualify for the Rule 506 exemption for any of the offerings.[482]

4. Tri-Core Respondents failed to refute evidence of fraud or to establish exemption to the anti-fraud statute

The Division asserts that exemptions do not apply to the anti-fraud rules of either the federal or Arizona securities laws and that, even if the securities at issue in this case were exempt from registration (which the Division argues they are not), they are not exempted from the anti-fraud provisions of A.R.S. § 44-1991.[483]

Without waiving any fraud arguments made in their initial Brief, the Division addressed the Tri-Core Respondents' arguments presented in their Brief with respect to the fraud charges.[484] The Division asserts that the Tri-Core Respondents use the incorrect legal standard for fraud, as Arizona's standard for fraud is not the same as the federal standard under Rule 10b-5, in that the federal rule

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[479] Ex S-47, see e.g. investors Marsik, Neuenschvander, Marcus, mays, Baldwin, Winkler, Sanchez, etc.
[480] Division Reply Brief at 9-10; Ex S-38, S-32. S-35. See, *e.g.,* investors Georgia Heieh, Miltz, Adams, etc.
[481] 17 CF.R. § 230.506(b)(2)
[482] Division Reply Brief at 10.
[483] Division Reply Brief at 11, *citing* 15 U.S.C. § 77q(c); *Little v. First California Co.*, 1977 WL 1054 (D. Ariz, 1977)("even though bank securities are exempt from the registration requirements of the 1933 Act, transactions in bank securities are not exempt from the anti-fraud provisions of either the 1993 Act or the 1934 Securities Exchange Act"); A.R.S. § 44-1991; *MacCollum v. Perkinson*, 185 Ariz. 179, 186, 913 P.2d 1097, 1104 (App. 1896) (holding that the statutory definition of a security for registration purposes is limited under A.R.S. § 44-1801(22) and the specified exemptions, but that the "securities fraud statute . . . includes the sale of even those securities that are exempted from the registration requirements.").
[484] Division Reply Brief at 11-19.

requires intent or scienter but there is no such requirement in Arizona. [485] Further, the Division asserts, it does not have the burden of proving intent to violate, or knowledge that a respondent was violating, the Securities Act because a misrepresentation or omission of a material fact in the offer and sale of a security is actionable under Arizona law even though it may be unintended or the falsity or misleading character of the statement may be unknown.[486] Even so, the Division argues, there was no evidence at hearing that the Tri-Core Respondents were unaware of any of the fraud at issue.[487] The Division asserts that the Tri-Core Respondents appear to agree that the information regarding the tax liens against TCMLD's principal, Mr. Stevens, should have been disclosed, although the Tri-Core Respondents assert that only Mr. Stevens had the duty to disclose.[488] The Division argues such position is not the law and that it is a violation for anyone offering or selling securities to omit a material fact.[489] The Division argues that TCBD, as the acting dealer for the TCMLD offering, omitted this material fact, which constituted fraud.[490]

The Division argues that it conclusively established that representations in the investment documents regarding salesmen qualifications regarding commissions were false, as the evidence at hearing shows that individuals and entities who were not registered brokers or dealers with NASD (FINRA) received sales fees or commission.[491] The Division argues that the Tri-Core Respondents unsuccessfully attempt to argue that there is an "issuer exemption" from registration for "officers, directors, and full-time employees" that would excuse the fraud. The Division asserts that the investment documents affirmatively state, however, that "registered brokers or dealers who are members of NASD" are allowed to receive commissions for selling the investments, and do not state anywhere that individuals that are exempt from registration may sell and receive commissions.[492] The Division believes that the distinction is important because "a reasonable investor would likely rely on

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[485] *See Eastern Vanguard Forex Ltd. v Ariz. Corp Com'n*, 206 Ariz. 399, 414, 79 P.3d 86, 101 (App 2003); *Allstate Life Insurance Company v. Baird & Co. Inc.*, 756 F. Supp.2d 1113 (2010); *State v. Gunnison*, 127 Ariz. 110, 113, 618 P.2d 604, 609 (1980); *State v. Burrows*, 13 Ariz. App. 130, 474 P.2d 849 (1970).
[486] *See Rose v. Dobras*, 128 Ariz. 209, 214, 624 P.2d 892, 889 (App. 1981).
[487] Division Reply Brief at 12.
[488] *Citing* Tri-Core Respondents' Brief at 24.
[489] See A.R.S. § 44-1991(A)(2).
[490] See Division Initial Brief at 34-35.
[491] Division Reply Brief at 13, *citing* Division Initial Brief at 38-52.
[492] Division Reply Brief at 13.

such a statement given that a registered broker or dealer has expertise in evaluating the investment before offering and selling it."[493] Moreover, the Division argues, even if there were some type of exemption for officers, directors, and full-time employees of the issuer, there is no evidence that Mr. Polanchek or his entities, who received significant sales fees for several offerings, were officers, directors, or full-time employees of the issuers.[494]

The Division states that the Tri-Core Respondents appear to argue that on-going efforts to acquire the Mexican property and obtaining extensions of the notes somehow negate the fraud related to promises in the subject offerings.[495] The Division asserts that such actions do not negate fraud and that the evidence at hearing contradicts these claims.[496]

With respect to the TCMLD Offering, the Division argues that admitting to select TCMLD investors, years after the investments were offered and sold, that there are title issues with Lot 5 does not negate the fraud. The Division notes that the TCMLD investment documents represented that the notes were "Secured Promissory Notes" and "are secured by the land Tri-Core Mexico Land Development LLC purchases," and that nowhere did they state that TCMLD would not own the property. In addition, the Division states that investors were told that the investment was "safe" due to the security that was pledged, and never informed of the risk that the land would not be purchased or that the investment would not be secured. Further, while there was evidence that a few TCMLD investors signed extension agreements after the notes became due, the Division argues that this does not negate the fraud that occurred during the offer and sale of the securities, but rather constitutes additional fraudulent conduct associated with the extensions as the title issues should have been disclosed before the investors signed the extensions.[497] The Division cites to testimony from three TCMLD investors who signed extensions that at the time they signed the extensions in 2011, they were not told about the title issue with Lot 5 (which had existed since 2007) and instead were told by TCMD that the economy was to blame for non-payment and that TCMLD could not afford the high interest

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[493] *Id.*
[494] *Id.*
[495] See Tri-Core Respondents' Brief at 24.
[496] Division Reply Brief at 13.
[497] *Id.* at 14-15.

rate of the notes.[498] The Division also argues that the claim that TCMLD intends to purchase Lot 5 does not correct the fraud, and that such argument is a "diversionary tactic" to make it appear that TCMLD has the ability to repay investors when it does not, as Mr. Stevens testified that even if title issues are resolved favorably to TCMLD, TCMLD has no additional funds to pay the remaining balance of the $1.7 million purchase price for Lot 5.[499]

With respect to the TCC 2/08 Offering, the Division asserts that the Tri-Core Respondents effectively have no response to the allegations of fraud concerning the Lot 5 investment and instead claim that this PPM "was issued in error" and that there is only a single note-holder for this offering. The Division responds that there is no evidence that this PPM was issued in error and that, according to documents produced by TCC, at least seven investors invested in the TCC 3/08 offering, with $335,000 raised.[500] The Division finds it hard to believe that the offering was a mistake when TCC accepted funds from and Mogler signed the investment documents for seven investors. The Division argues that none of the instances of fraud it established at hearing are negated by a claim the PPM was issued in error.[501]

Tri-Core Respondents appear to argue, without citation to the record, that there is no fraud related to the TCC 3/08 offering (Lot 47/Relaxante) because TCC holds the "deed" to Lot 47, and there is no mechanism for securing investors with property in Mexico.[502] The Division asserts that Respondents' argument is directly contradicted by the evidence at hearing.[503] First, the Division notes that it was not disclosed to investors that TCC could not hold title to Lot 47 due to Mexican laws and that the 3/08 investment documents advised investors that TCC would own Lot 47. The Division states that the only relevant document at hearing was a Sales Agreement for Lot 47 with the purchaser identified as "Phoenix Premium Developers, Sociedad De Responsabilidad Limitada De Capital Variable," not TCC.[504] The Division argues that the statements concerning ownership and security

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[498] Ex. S-106, S-110, S-122; Tr. at 471, 490, 700-701.
[499] Division Reply Brief at 15; *citing* HT at 828-830, 843, 844-845.
[500] Division Reply Brief at 15; Exs S-30, S-32 at ACC004716, S-50, Exs S-128-S-129, S-132-S-138, S-140, S-220; HT at 127-129, 135-144.
[501] Division Reply Brief at 15; Division Initial Brief at 41-43.
[502] Tr. at 1004-1005.
[503] Division Reply Brief at 16.
[504] Exs S-45(a), S-45(b); Tr. at 159-165.

related to Lot 47 were material representations. Furthermore, the Division asserts that the Tri-Core Respondents' claims that investors did not want to be on the title and that steps were being taken to securitize them are not supported by the record and should be stricken.[505] The Division argues that it was a material misrepresentation that investors were never told that it was a risk that they would not be given security, when the investment documents indicated that they would.[506]

With respect to the 6/10 Offering, the Tri-Core Respondents argue that because a parcel in Mexico is "in process of being titled," there is no fraud related to the ownership and security for this offering, although the TCC 6/10 investment documents advised investors that the offering consisted of "Secured Promissory Notes" and that the notes are "secured by the land Tri-Core Companies LLC purchases."[507] The Division contends that the record shows that investors were also orally promised that their investment would be securitized by Mexican land and that Mogler represented, in a public broadcast at the time that the TCC 6/10 investment was being offered, that investments in Mexican land were "safe" because they were secured by land.[508] The Division asserts that at no time were investors advised of any risk that their investment would not be secured.[509] At hearing, TCC's representative testified that Lot 3 was in the process of being titled, but that as of the hearing date, title was held by Sylvia Torres, not TCC, and he could not explain why title had not been transferred from Ms. Torres.[510] The Division argues that the evidence at hearing established that investors have never been provided proof that their investment funds were used to purchase land in Mexico and further asserts that TCC failed to produce any title documents at hearing.[511] The Division characterizes TCC's credibility as to the existence and purchase of Lot 3 as "tenuous at best."[512]

The Division states further that even if the purchase of Lot 3 is completed, TCC's representative admitted that under Mexican law, title cannot be held in fee simple by TCC; the Division argues that it is a material misstatement to represent to investors that TCC would own the land. Finally, the Division

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[505] Division Reply Brief at 16.
[506] *Id.; Exs S-21, S-23, S-26, S-*227, S-255(b); Tr. at 207-212, 224-229, 408-413,426-438, 535-536.
[507] *See e.g.* Ex S-187 at TCC_003269.
[508] *See e.g.* HT at 676-677.
[509] Division Reply Brief at 17.
[510] Tr. at 1031.
[511] Tr. at 590, 681, 1035.
[512] Division Reply Brief at 17.

asserts that there is no evidence in the record to demonstrate how investors would be collateralized with property, as asserted by the Tri-Core Respondents, or how TCC could securitize investors with property it does not own.[513] The Division concludes that investors were not advised of this risk, and that the promise of a securitized note was a material misstatement.

With respect to the ERCC Offering, the Division states that the Tri-Core Respondents attempt to argue that due to legal advice regarding a pending lawsuit, they chose not to purchase equipment with investor funds.[514] The Division asserts that because the statement in the brief is not supported by any testimony or evidence, it should be stricken, but if it is considered, it does not provide a defense to the alleged fraud. The ERCC investment documents indicate that the investment proceeds were to be used to purchase compactor equipment to be installed at commercial locations, and that the notes would be secured.[515] The Division asserts that the Tri-Core Respondents provided no proof at hearing as to what happened with investor funds, and no proof that any equipment was purchased as promised in the investment documents. The Division argues that the statements regarding use of investor funds and securitization were material misstatements.[516]

5. Statements of facts not supported by the record should be stricken.

Finally, the Division argues that the Tri-Core Respondents had ample time to prepare and resent their case, as they were granted a continuance of almost four months after the Division presented its case. Instead of establishing facts at the hearing, however, the Division asserts that the Tri-Core Respondents use their Brief to assert "facts."[517] The Division argues that statements about what witnesses did not say, or purportedly said after leaving the stand, as well as facts that the Tri-Core Respondents did not even try to have admitted at hearing, are inappropriate and should be stricken.[518]

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[513] Division Reply Brief at 18.
[514] *Citing* Tri-Core Respondents' Brief at 12 and 36.
[515] See e.g. S-191 at ERCC_000309 and ERCC_000305, 314.
[516] Division Reply Brief at 19.
[517] Tri-Core Respondents' Brief at 37-40.
[518] Division Reply Brief at 19. For example, the Division notes that the Tri-Core Respondents had the opportunity to cross examine Mr. Sherman, and did cross examine them, but did not question him about his relationship with Mr. Polanchek, discussions Mr. Polanchek was alleged to have had with Mr. Buckley concerning the investor questionnaire or a purported arrangement regarding ERC Chicago are not part of the record. Furthermore, the Division states that there is no factual basis for the Tri-Core Respondents' claim that they were unable to re-call Mr. Polanchek during the hearing is unsupported by the record. Counsel for the Division denies that she ever advised any witness that they would be arrested if they appeared at the hearing, and Tri-Core Respondents never raised any issues regarding Mr. Polanchek's ability to testify.

V. Analysis and Resolution

The Tri-Core Respondents do not cite to the hearing record for their assertions of fact, and much of their Brief responds to the Notice instead of the arguments and facts presented at hearing. The Tri-Core Respondents had a fair opportunity to cross-examine witnesses. Only factual statements supported by the record are considered in our analysis and conclusions.

A. Alleged registration violations

A.R.S. § 44-1801(26) provides: "'Security' means any note . . . ." It is unambiguously clear that notes are securities. The Arizona Supreme Court in *State v. Tober*, held that the Securities Act provided a clear definition of the term "note" and that all notes are securities that must be registered with the Commission unless an exemption applies. The *Tober* Court found that an analysis of whether a note is a security does not require an analysis under a "risk capital" test or "family resemblance test" (tests developed by federal courts), or any variant test, because Arizona's statutory scheme leaves no room for "judicial gloss," and there is no uncertainly in its application.[519]

The offerings by TCMLD, TCC, ERCC, C&D, and ERCI at issue in this proceeding are clearly notes: they are titled "Promissory Notes," contain terms of two years, and provide for annual interest at rates ranging from 18 to 80 percent. The Tri-Core Respondents do not contest this point. Thus, we find that the Promissory Notes offered by TCMLD, TCC, ERCC, C&D, and ERCI described herein are securities under Arizona law for purposes of registration requirements.

A.R.S. § 44-1841(A) prohibits the sale of securities unless they have been registered, except if they are securities exempt under § 44-1843 or § 44-1843.01, or are sold in exempt transactions under § 44-1844. A.R.S. § 44-1842 prohibits the sale of securities by unregistered dealers or sellers. There is no evidence that the Promissory Notes sold by TCMLD, TCC, ERCC, C&D and ERCI were registered, or that TCMLD, TCC, ERCC, C&D, or ERCI registered with the Commission. The Division presented certificates of non-registration for the securities at issue.[520]

The Tri-Core Respondents did not argue that the Promissory Notes at issue are not securities, or that they are registered, but claim that they are exempt from registration due to the "issuer

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[519] *Tober*, 841 P.2d at 208.
[520] Ex S-1(a), (b), (c), (d), (e) and (f).

exemption" under federal law, and qualify for the "safe harbor" provided by Rule 506 of Regulation D.[521] They argue that the "issuer exemption" allows a company to sell its securities if the securities are sold by officers, directors, or full-time employees of the issuer, who are not paid compensation for their sales efforts. They also argue that they were careful to preserve the safe harbor provision of Rule 506 by not advertising the offerings, ensuring that public seminars were educational only, including language in the PPMs that identified risks and advised potential investors to consult with legal and financial advisors, urging potential buyers to ask questions, and asking potential buyers to visit any of the properties discussed in the PPMs.

Rule 506 of Regulation D is considered a "safe harbor" for private offerings, and companies that rely on the Rule 506 exemption can raise an unlimited amount of money without having to register their securities. Pursuant to Rule 506(b), a company is exempt from registering a private placement offering if it satisfies the following standards:

(1) The company cannot use general solicitation or advertising to market the securities;

(2) The company may sell its securities to an unlimited number of "accredited investors" and up to 35 other purchasers, and all non-accredited investors must be sophisticated—having sufficient knowledge and experience in financial and business matters to make them capable of evaluating the merits and risks of the prospective investment;

(3) The company can decide what information to give to accredited investors, so long as it does not violate the anti-fraud prohibitions of the securities laws, but must give non-accredited investors disclosure documents that are generally the same as those used in registered offerings and must make available to non-accredited investors any information provided to accredited investors;

[521] Tri-Core Respondents do not cite to the regulations. However, SEC Regulation D contains several rules that provide exemptions from the registration requirements of the Securities Act of 1933. The relevant rule according to the Tri-Core Respondents is Rule 506 (17 CFR 230.506). This Rule allows small companies to raise capital without having to register with the SEC if they comply with all of its provisions.

(4) The company must be available to answer questions from prospective purchasers; and

(5) The company must provide specified financial statements.[522]

Companies relying on Rule 506 exemptions do not have to register their offerings with the SEC, but they must file a "Form D" after they first sell their securities.

The Tri-Core Respondents appear to argue that the PPMs were exempt from registration pursuant to A.R.S. § 44-1844(A)(1) and that all necessary and appropriate paperwork was filed by counsel.[523] A.R.S. § 44-1844(A) exempts transactions not involving any public offering from the registration requirement. To qualify for exemption pursuant to § 44-1844(A), there can be no "general solicitation" or "general advertising" in connection with the sale of the securities.

Aside from baldly claiming exemptions from regulation under federal and state law, the Tri-Core Respondents provide no analysis of how the exemptions would apply to the offerings at issue in this case. They appear to argue that because the securities were exempt under Rule 506, Mogler, as an officer of the issuer, was allowed to sell the PPM securities.[524]

Pursuant to A.R.S. § 44-2033, the Tri-Core Respondents have the burden of proving the existence of any exemption, and the Division does not have to show that an exemption does not apply. In *State v. Baumann*, the Arizona Supreme Court held that there must be strict compliance with all of the requirements of the exemption statute.[525]

The offerings at issue in this proceeding do not meet the requirements of the Rule 506 safe harbor or qualify for exemption under A.R.S. § 44-1844(A). To qualify for Rule 506, the securities must meet all of the requirements of the Rule. Here, the offerings fail to qualify for the Rule 506 safe harbor under the general solicitation prohibition and the limitations on sales to unaccredited investors and further fail to qualify for exemption under A.R.S. § 44-1844(A) due to the public offering

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[522] See 17 CFR 230.506. Under Rule 506(c), a company may broadly and generally advertise the offering, but still be presumed to be undertaking a private offering if the investors are all accredited investors and the company has taken steps to verify that its investors are accredited, which could include reviewing documentation such as W-2s, tax returns, bank or brokerage statements, credit reports, etc.

[523] Tri-Core Respondents' Brief at 8 (re TCC 3/08 PPM); at 10 (re TCC 6/10 PPM); at 13 (ERCC PPM); at 15-16 (TCMLD PPM); at 19 (re ERC PPM).

[524] Tri-Core Respondents' Brief at 2 (re 2/08 PPM); 4 & 7 (re 3/08 PPM),

[525] 125 Ariz. 404, 411, 610 P.2d 38,45 (1980).

prohibition. The lists of investors in the various offerings are extensive and involve investors living throughout the United States and abroad; the investments in Mexican land and recycling were touted in radio broadcasts that directed listeners to visit the AIC website, and at vendor fairs; and there was evidence that investors learned about the investments from advertisements. Tri-Core Respondents offered testimony that Mr. Polanchek knew some of the investors, but this testimony is not sufficient to overcome the weight of the evidence that supports the finding that all of the offerings were widely disseminated to the general public. Neither does the fact that there are a relatively small number of actual note holders for the ERCC and C&D offerings negate the evidence that the investments were generally advertised. Moreover, the record supports the finding that the offerings were sold to unaccredited investors and contains no evidence that the Respondents ever attempted to determine whether the investors were sophisticated. The Tri-Core Respondents may have intended that the offerings be exempt under Regulation D, but they did not rigorously adhere to the requirements of the safe harbor rule or comply with A.R.S. § 44-1844(A), and the lack of intent to violate the registration provisions is not required to find a violation of the registration requirement.

Based on the weight of the evidence, we find that none of the offerings discussed herein qualify for exemption from registration.

B. Alleged violations of the anti-fraud securities statutes

In addition to the charges for failure to register the securities, and to register as a broker/dealer with the Commission, the Division alleged that the Tri-Core Respondents violated A.R.S. § 44-1991 multiple times associated with each offer.

There are different tests for determining whether notes are securities for purposes of the registration provisions and for purposes of the anti-fraud provisions. Although we conclude above that the Promissory Notes in this case are clearly securities and subject to registration requirement pursuant to A.R.S. §§ 44-1801, 44-1841, and 44-1842, and the holding of *State v. Tober*, we also find that they meet the test for securities under the securities fraud statutes, as set forth in *MacCollum v. Perkinson*. The *MacCollum* court acknowledged that under *Tober*, a note is a security, and is required to be registered, unless it is exempt under A.R.S. § 44-1843 or § 44-1844. The *MacCollum* court found that in the context of alleged violation of the anti-fraud provisions of the Securities Act (A.R.S. § 44-1991),

the analysis for determining whether a note is a security is different from the analysis employed under the registration statutes. The *MacCollum* court noted that the securities fraud statute defines a security in broader terms than the registration statutes. While the registration statutes are limited by the language of A.R.S. § 44-1801 and the specified statutory exemptions, the securities fraud statute includes the sale of even those securities that are exempted from registration requirements.[526] When fraud is alleged, the *MacCollum* court found, the legislature left it to the courts to determine which of myriad financial transactions fall within the coverage of the securities fraud statute; and the courts have relied on more specific judicial definitions of security than the general one found in A.R.S. § 44-1801(22). When the security in question is a note, the *MacCollum* court determined, the "family resemblance" test devised by the United States Supreme Court in *Reves v. Ernst & Young*[527] should be utilized to determine the meaning of security under § 44-1991.

The *Reves* Court developed a two-pronged test to determine whether the presumption that a note is a security can be rebutted. The first prong has four parts that are balanced and considered as a whole. First, we examine the motivations of the seller and buyer—if funds are raised for the general use of the enterprise or to finance substantial investments, and the buyer is interested primarily in the profit of the note, the note is more likely to be a security. Second, we examine the "plan of distribution" of the instrument—whether there is an instrument in which there is "common trading for speculation or investment." Third, we examine the reasonable expectation of the investing public. Fourth, we examine whether there is another regulatory scheme that significantly reduces the risk of the instrument, thereby rendering the application of the Securities Act unnecessary.[528] Thus, when

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[526] *MacCollum*, 913 P.2d at 1104; See also A.R.S. § 44-1991 (A) which provides: "It is fraudulent practice and unlawful for a person, in connection with a transaction or transactions within or from this state involving an offer to sell or buy securities, or a sale or purchase of securities, including securities exempted under § 44-1843 or § 44-1843.01 and including transactions exempted under § 44-1844, § 44-1845 or § 44-1850, directly or indirectly to do any of the following:

1) Employ any device, scheme or artifice to defraud.
2) Make any untrue statement of material fact, or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.
3) Engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit."

[527] *Reves v. Ernst & Young*, 494 U.S. 56 (1990). The Court determined that the phrase "any note" should not be interpreted to mean literally "any note" but must be understood against the backdrop of what Congress was attempting to accomplish with the Securities Acts (which was to regulate the investment market, not creating a general federal cause of action for fraud), with notes issued in an investment context being "securities" while notes issued in a commercial or consumer context are not.

[528] *Reves,* 494 U.S. at 66-67.

determining whether a note is a security for anti-fraud purposes, we are to presume it is a security, but allow that presumption to be rebutted if the note bears a strong resemblance (in terms of the four factors) to one of the enumerated categories of instruments not considered to be securities.

Upon considering the factors set forth in *Reves*, we conclude that the notes at issue here are securities for purposes of the anti-fraud provisions of the Securities Act. The motivation of the parties strongly supports this conclusion, as the proceeds of the notes were used for the general purpose of the enterprise or a substantial purchase, and the high interest rates indicate that the buyers were motivated by profits from their investment. In this case, the notes were sold to a wide range of individuals. Thus, the second factor—whether the notes were widely distributed to the general public, as opposed to financial institutions—also supports a determination that the protections of the securities acts should apply. The third factor is the public's expectation. Here, reasonable buyers of these notes would likely consider themselves to be investors, both because the offerors often referred to them as such and because the purchasers expected a much higher return. We do not find any reasonable factors that would countervail the conclusions that the notes were securities. Fourth, we consider whether there is a risk-reducing factor associated with the instruments. Here, the notes were supposed to be secured by real estate or equipment, although in reality they were not. Normally, the securitization would be a factor countervailing the conclusion that the notes were securities, but here, this one factor is not sufficient to rebut the presumption that these notes are securities—especially since the notes are not, and never were, actually securitized.

The Tri-Core Respondents assert that they did not engage in fraudulent activities in connection with the solicitation or sale of any of the Promissory Notes. We do not find their arguments persuasive. Violations of § 44-1991 do not require a showing of intent or scienter.[529] While the Tri-Core Respondents cite different disclaimers in the PPMs discussing various risks, these disclaimers do not negate the misrepresentations and omissions of material facts that were present in the offer and sale of these unregistered securities. We find that the Division has shown, by a preponderance of the evidence, that each of the offerings at issue here contained multiple material misstatements or omissions that

[529] State v. Gunnison, 127 Ariz. 110, 618 P2d 604 (1980).

constitute fraud pursuant to A.R.S. § 44-1991 as set forth below:

The TCMLD offering: (1) failure to disclose tax liens against its principal Stevens; (2) misrepresentations about management's qualifications; (3) omissions related to TCMLD's ability to hold title to land in Mexico; (4) misrepresentations concerning the safety of the investment; (5) failure to disclose the litigation surrounding title to Lot 5; (6) failure to disclose that Parcel 5 of Lot 5 was promised to TCBD as compensation; and (7) misrepresentations concerning salesmen qualifications to receive commissions or fees.

The TCC 2/08 offering: (1) failure to use investor funds for the stated purpose of purchasing Lot 5; (2) misrepresentations concerning the purchase and ownership of Lot 5 and securitization of the promissory notes; (3) failure to disclose that the Lot 5 that is referenced in the TCC 2/08 offering is the same Lot 5 as in the TCMLD offering, or that the referenced parcel should be Parcel 5 of Lot 5; (4) failure to disclose that Parcel 5 of Lot 5 was pledged to TCBD; (5) failure to disclose the litigation involving title to Lot 5; (6) misrepresentations regarding management's qualifications; and (7) misrepresentations regarding salesmen qualifications regarding commissions.

The TCC 3/08 offering: (1) misrepresentations concerning the ownership of Lot 47; (2) misrepresentations concerning the safety and securitization of the investment; (3) misrepresentations of management's qualifications; (4) misrepresentations of salesmen qualifications regarding commissions; and (5) failure to disclose that investor funds were used for personal purposes.

The TCC 6/10 offering: (1) misrepresentations that the investment would be secured; (2) omission of the fact that TCC cannot hold title to the property under Mexican law; (3) failure to inform investors of the risk that TCC could not provide the promised security for the note; (4) misrepresentations regarding management's qualifications; (5) misrepresentations regarding salesmen qualifications regarding commissions; and (6) failure to disclose personal use of investor funds.

The ERCC offering: (1) misrepresentation of the use of investor funds; (2) misrepresentation of management's qualifications; (3) misrepresentations regarding salesmen qualifications regarding commissions; and (4) failure to disclose the personal use of investor funds.

The C&D offering: (1) misrepresentations concerning the security; (2) misrepresentations regarding salesmen qualifications regarding commissions; and (3) failure to disclosure personal use of

investor funds.

The ERCI offering: (1) misrepresentations regarding the management of the company; and (2) failure to disclose the ownership of the collateral.

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Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

FINDINGS OF FACT

1. TCMLD is a manager-managed limited liability company organized in Arizona in May 2007. Since its inception, James Lex Stevens ("Stevens") has been TCMLD's manager and a member, with members Sylvia Torres Macker and Mogler.

2. TCBD is an Arizona limited liability company organized in January 2006 as a member-managed company, and converted to a manager-managed company, with Mogler as the managing partner, in 2007. Pursuant to an agreement between TCMLD and TCBD, TCBD acted as agent for TCMLD for the TCMLD offering. Investors in the TCMLD offering sent their investment documents to TCMLD and wired or made checks payable to TCBD, at the same address in Scottsdale, Arizona. During the relevant period, Mogler was a signatory on TCBD bank accounts and received bank statements at his home address.

3. TCBD is not registered with the Commission as a securities dealer or salesman.

4. Mogler is not registered with the Commission as a securities dealer or salesman.

5. TCMLD has already been defaulted and found to have violated A.R.S. §§ 44-1841 and 44-1842, and ordered to pay restitution to investors and to pay administrative penalties.[530] We find that, in addition, the TCMLD offering was not registered with the Commission in violation of A.R.S. § 44-1841.

6. TCBD acted as agent for TCMLD, raising capital and managing investor funds; thus, as discussed herein, TCBD offered and sold the unregistered TCMLD offering in or from Arizona in violation of A.R.S. § 44-1841. TCBD was not registered as a dealer or salesman when offering the

[530] Decision No. 73667.

unregistered TCMLD security in violation of A.R.S. § 44-1842. TCBD offered and sold unregistered securities in or from Arizona in the form of notes for the TCMLD offering 61 times, raising a total of $1,165,000.[531]

7. As discussed herein, the offer and sale of securities by TCBD, related to the TCMLD offering, included at least 7 instances of material misstatements or omissions that constituted fraud.

8. TCC is a limited liability company organized in Arizona in August 2007. Originally organized as a member-managed company, TCC was changed to a manager-managed company in October 2007, with Mogler as the manager. During all relevant periods, Mogler was a signatory on TCC bank accounts.[532]

9. The TCC 2/08 offering was comprised of notes that were not registered as securities with the Commission, and TCC was not registered as a dealer or salesman.

10. TCC offered and sold unregistered securities in the form of notes for the TCC 2/08 offering within or from Arizona at least 7 times, totaling $335,000.[533]

11. Every offer and sale of the unregistered securities related to the TCC 2/08 offering included at least 7 instances of fraud in connection with the offer and sale by TCC.

12. TCC offered and sold unregistered securities in the form of notes for the TCC 3/08 offering within or from Arizona at least 29 times, raising a total of $1,158,832 for the TCC 3/08 offering.[534]

13. Every offer and sale of the unregistered securities related to the TCC 3/08 offering included at least 5 instances of fraud in connection with the offer and sale by TCC.

14. The TCC 6/10 offering was comprised of notes that were not registered as securities with the Commission, and TCC was not registered as a dealer or salesman.

15. TCC offered and sold unregistered securities in the form of notes for the 6/10 offering within or from Arizona at least 7 times.[535]

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[531] See Ex S-219.
[532] Exs S-2(a) and S-13 at ACC006340-6351.
[533] *See* Ex. S-220.
[534] *See* S-221.
[535] *See* S-222.

16. Every offer and sale of the unregistered securities related to the TCC 6/10 offering included at least 6 instances of fraud in connection with the offer and sale by TCC.

17. ERCC was a manager-managed limited liability company organized in Arizona in August 2011. During the relevant period, Mogler was the manager of ERCC and the sole signatory on the ERCC bank accounts.

18. The ERCC offering was comprised of notes that were not registered as securities with the Commission, and ERCC was not registered as a dealer or salesman.

19. ERCC offered and sold unregistered securities in the form of notes for the ERCC offering within or from Arizona at least 10 times.[536]

20. Every offer and sale of the unregistered securities related to the ERCC offering included at least 5 instances of fraud in connection with the offer and sale by ERCC.

21. C&D was formed in Nevada in 2000.[537] Mogler signed the C&D investment documents for C&D, and investors were told that TCBD was acting as agent for C&D and were directed to deliver investment documents to TCBD in Scottsdale and to make checks payable to TCBD. During the relevant period, Mogler was a signatory on the TCBD bank accounts.

22. The C&D offering was comprised of notes that were not registered as securities with the Commission, and C&D was not registered as a dealer or salesman.

23. C&D offered and sold unregistered securities in the form of notes for the C&D offering within or from Arizona at least 11 times.[538]

24. Every offer and sale of the unregistered securities related to the C&D offering included at least 3 instances of fraud in connection with the offer and sale.

25. ERCI was a manager-managed limited liability company organized in Arizona in April 2011.[539] During the relevant period, Mogler was the manager of ERCI and was the sole signatory on the ERCI bank accounts.[540]

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[536] *See* S-223.
[537] Ex S-7.
[538] *See* S-224.
[539] Ex S-6(a).
[540] Exs S-6(a), S-19 at ACC008522-25.

26. The ERCI offering consisted of a note that was not registered as a security with the Commission, and ERCI was not registered as a dealer or salesman.

27. ERCI offered the unregistered security in the form of a note for the ERCI offering within or from Arizona at least once.

28. The offer of the unregistered security related to the ERCI offering included at least 2 instances of fraud in connection with the offer.

29. None of the Promissory Notes discussed herein were timely paid when they came due.

30. These findings of fact are based on the Discussion above, and those findings are also incorporated herein.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Article XV of the Arizona Constitution and the Securities Act of Arizona, A.R.S. § 44-1801 *et seq.*

2. The note offerings described herein and sold by Tri-Core Respondents, C&D, and ERCC, and offered by ERCI constitute securities within the meaning of A.R.S. § 44-1801.

3. The Tri-Core Respondents, C&D, ERCC, and ERCI acted as dealers and/or salesmen within the meaning of A.R.S. § 44-1801(9) and (22).

4. The actions and conduct of the Tri-Core Respondents, C&D, and ERCC constitute the offering and sales of securities within the meaning of A.R.S. § 44-1801(15) and (21), and the actions and conduct of ERCI constitute the offering of securities within the meaning of A.R.S. § 44-1801(15).

5. The securities offered and sold by the Tri-Core Respondents, C&D, and ERCC and offered by ERCI were neither registered nor exempt from registration, in violation of A.R.S. § 44-1841.

6. The Tri-Core Respondents, C&D, and ERCC offered and sold unregistered securities within or from Arizona in violation of A.R.S. § 44-1841, and ERCI offered to sell unregistered securities within or from Arizona in violation of A.R.S. § 44-1841.

7. The Tri-Core Respondents, C&D, and ERCC offered and sold securities within or from Arizona without being registered as a dealer and/or salesman, in violation of A.R.S. § 44-1842, and ERCI offered to sell securities within or from Arizona without being registered as a dealer and/or salesman, in violation of A.R.S. § 44-1842.

8. The Tri-Core Respondents, C&D, ERCC, and ERCI failed to meet their burden of proof, pursuant to A.R.S. § 44-2033, to establish that the securities offered and sold were exempt from registration under the Securities Act.

9. The Tri-Core Respondents, C&D, ERCC, and ERCI committed fraud in the offer and sale of unregistered securities, engaging in transactions, practices, or a course of business which involved untrue statements and omissions of material facts in violation of A.R.S. § 44-1991.

10. Respondent Mogler directly or indirectly controls or controlled TCC, TCBD, ERCC, and ERCI within the meaning of A.R.S. § 44-1999 at all relevant times related to the sales and offers described herein, and is jointly and severally liable with TCC, TCBD, ERCC, and ERCI for violations of A.R.S. § 44-1991.

11. Respondent Mogler directly or indirectly controls or controlled TCBD, within the meaning of A.R.S. § 44-1999, at all relevant times related to the sales and offers for the TCMLD and C&D offerings described herein, for which TCBD served as TCMLD's and C&D's agent, and is jointly and severally liable with TCBD for violations of A.R.S. § 44-1991.

12. The actions and conduct of the Tri-Core Respondents, C&D, ERCC, and ERCI constitute multiple violations of the Securities Act and are grounds for an order of restitution pursuant to A.R.S. § 44-2032 and A.A.C. R14-4-308 and administrative penalties pursuant to A.R.S. § 44-2036.

13. The Tri-Core Respondents, C&D, ERCC, and ERCI, have violated the Securities Act and should, pursuant to A.R.S. § 44-2032, cease and desist from any future violations of A.R.S. §§ 44-1841, 44-1842, and 44-1991, and all other provisions of the Act.

ORDER

IT IS THEREFORE ORDERED that for the Tri-Core Mexico Land Development LLC offering, pursuant to A.R.S. §§ 44-2032 and 44-1999(B), Tri-Core Business Development LLC and Jason Todd Mogler, jointly and severally, shall, within 90 days after the effective date of this Decision, pay restitution in the amount of $1,165,000, plus pre-judgment interest from the date that each investor invested (as set forth in Exhibit S-219), subject to any legal setoffs by the Respondents and confirmed by the Director of Securities.

IT IS FURTHER ORDERED that for the Tri-Core Mexico Land Development LLC offering,

pursuant to A.R.S. §§ 44-2036(A) and 44-1999(B), Tri-Core Business Development LLC and Jason Todd Mogler, jointly and severally, shall pay an administrative penalty in the amount of $150,000, payable by either Cashier's Check or Money Order payable to the "State of Arizona" and presented to the Arizona Corporation Commission for deposit into the general fund for the State of Arizona.

IT IS FURTHER ORDERED that for the Tri-Core Companies LLC 2/08 offering, pursuant to A.R.S. §§ 44-2032 and 44-1999(B), Tri-Core Companies LLC and Jason Todd Mogler, jointly and severally, shall, within 90 days after the effective date of this Decision, pay restitution in the amount of $335,000, plus pre-judgment interest from the date that each investor invested (as set forth in Exhibit S-220), subject to any legal setoffs by the Respondents and confirmed by the Director of Securities.

IT IS FURTHER ORDERED that for the Tri-Core Companies LLC 2/08 offering, pursuant to A.R.S. §§ 44-2036(A) and 44-1999(B), Tri-Core Companies LLC and Jason Todd Mogler, jointly and severally, shall pay an administrative penalty in the amount of $35,000, payable by either Cashier's Check or Money Order payable to the "State of Arizona" and presented to the Arizona Corporation Commission for deposit into the general fund for the State of Arizona.

IT IS FURTHER ORDERED that for the Tri-Core Companies LLC 3/08 offering, pursuant to A.R.S. §§ 44-2032 and 44-1999(B), Tri-Core Companies, LLC and Jason Todd Mogler, jointly and severally, shall, within 90 days after the effective date of this Decision, pay restitution in the amount of $1,158,832, plus pre-judgment interest from the date that each investor invested (as set forth in Exhibit S-221), subject to any legal setoffs by the Respondents and confirmed by the Director of Securities.

IT IS FURTHER ORDERED that for the Tri-Core Companies LLC 3/08 offering, pursuant to A.R.S. §§ 44-2036(A) and 44-1999(B), Tri-Core Companies LLC and Jason Todd Mogler, jointly and severally, shall pay an administrative penalty in the amount of $100,000, payable by either Cashier's Check or Money Order payable to the "State of Arizona" and presented to the Arizona Corporation Commission for deposit into the general fund for the State of Arizona.

IT IS FURTHER ORDERED that for the Tri-Core Companies LLC 6/10 offering, pursuant to A.R.S. §§ 44-2032 and 44-1999(B), Tri-Core Companies LLC and Jason Todd Mogler, jointly and severally, shall, within 90 days after the effective date of this Decision, pay restitution in the amount

of $370,000, plus pre-judgment interest from the date that each investor invested (as set forth in Exhibit S-222), subject to any legal setoffs by the Respondents and confirmed by the Director of Securities.

IT IS FURTHER ORDERED that for the Tri-Core Companies LLC 6/10 offering, pursuant to A.R.S. §§ 44-2036(A) and 44-1999(B), Tri-Core Companies LLC and Jason Todd Mogler, jointly and severally, shall pay an administrative penalty in the amount of $30,000, payable by either Cashier's Check or Money Order payable to the "State of Arizona" and presented to the Arizona Corporation Commission for deposit into the general fund for the State of Arizona.

IT IS FURTHER ORDERED that for the ERC Compactors, LLC offering, pursuant to A.R.S. §§ 44-2032(1) and 44-1999(B), ERC Compactors, LLC and Jason Todd Mogler, jointly and severally, shall, within 90 days after the effective date of this Decision, pay restitution in the amount of $880,000, plus pre-judgment interest from the date that each investor invested (as set forth in Exhibit S-223), minus the $47,477 repaid to specific investors and subject to any other legal setoffs by the Respondents and confirmed by the Director of Securities.

IT IS FURTHER ORDERED that for the ERC Compactor, LLC offering, pursuant to A.R.S. §§ 44-2036(A) and 44-1999(B), ERC Compactors, LLC and Jason Todd Mogler, jointly and severally, shall pay an administrative penalty in the amount of $25,000, payable by either Cashier's Check or Money Order payable to the "State of Arizona" and presented to the Arizona Corporation Commission for deposit into the general fund for the State of Arizona.

IT IS FURTHER ORDERED that for the C&D Construction Services, Inc. offering, pursuant to A.R.S. §§ 44-2032(1) and 44-1999(B), C&D Construction Services, Inc., Tri-Core Business Development, LLC, and Jason Todd Mogler, jointly and severally, shall, within 90 days after the effective date of this Decision, pay restitution in the amount of $735,000, plus pre-judgment interest from the date that each investor invested (as set forth in Exhibit S-224), minus the $196,520.67 repaid to specific investors and subject to any other legal setoffs by the Respondents and confirmed by the Director of Securities.

IT IS FURTHER ORDERED that for the C&D Construction Services, Inc. offering, pursuant to A.R.S. §§ 44-2036(A) and 44-1999(B), Tri-Core Business Development LLC and Jason Todd Mogler, jointly and severally, shall pay an administrative penalty in the amount of $25,000, and C&D

Construction Services, Inc., individually, shall pay an administrative penalty in the amount of $25,000, payable by either Cashier's Check or Money Order payable to the "State of Arizona" and presented to the Arizona Corporation Commission for deposit into the general fund for the State of Arizona.

IT IS FURTHER ORDERED that for the ERC Investments, LLC offering, pursuant to A.R.S. §§ 44-2036(A) and 44-1999(B), ERC Investments, LLC and Jason Todd Mogler, jointly and severally, shall pay an administrative penalty in the amount of $10,000, payable by either Cashier's Check or Money Order payable to the "State of Arizona" and presented to the Arizona Corporation Commission for deposit into the general fund for the State of Arizona.

IT IS FURTHER ORDERED that pursuant to A.R.S. § 44-2032, Respondents Tri-Core Business Development, LLC; Tri-Core Companies, LLC; ERC Compactors, LLC; ERC Investments, LLC; C&D Construction Services, Inc.; and Jason Todd Mogler shall cease and desist from their acts described hereinabove in violation of A.R.S. §§ 44-1841, 44-1842 and 44-2031 and from further violations of the Securities Act.

IT IS FURTHER ORDERED that the restitution ordered hereinabove shall bear interest at the rate of the lesser of 10 percent per annum, or the rate per annum that is equal to 1 percent per annum plus the prime rate as published by the Board of Governors of the Federal Reserve System in Statistical Release H.15, or any publication that may supersede it, on the date that the judgment is entered; may be deemed in default; and shall be immediately due and payable, without further notice.

IT IS FURTHER ORDERED that the payment and obligation for these administrative penalties shall be subordinate to any restitution and shall become immediately due and payable only after restitution payments have been paid in full, or upon Respondents' default with their restitution obligations.

IT IS FURTHER ORDERED that all ordered restitution payments shall be deposited into an interest-bearing account(s), if appropriate, until distributions are made.

IT IS FURTHER ORDERED that default shall render Respondents Tri-Core Business Development, LLC; Tri-Core Companies, LLC; ERC Compactors, LLC; ERC Investments, LLC; C&D Construction Services, Inc.; and Jason Todd Mogler liable to the Commission for its costs of collection and interest at the rate of the lesser of 10 percent per annum, or the rate per annum that is

equal to 1 percent plus the prime rate as published by the Board of Governors of the Federal Reserve System in Statistical Release H.15, or any publication that may supersede it, on the date that the judgment is entered.

IT IS FURTHER ORDERED that the Commission shall disburse the funds on a pro-rata basis to the investors shown on the records of the Commission. Any restitution funds that the Commission cannot distribute because an investor refuses to accept such payment, or any restitution funds that cannot be disbursed to an investor because an investor is deceased and the Commission cannot reasonably identify and locate the deceased investor's spouse or natural children surviving at the time of distribution, shall be disbursed on a pro-rata basis to the remaining investors shown on the records of the Commission. Any funds that the Commission determines it is unable to disburse or that cannot feasibly be disbursed shall be transferred to the general fund of the State of Arizona.

IT IS FURTHER ORDERED that if Respondents Tri-Core Business Development, LLC; Tri-Core Companies, LLC; ERC Compactors, LLC; ERC Investments, LLC; C&D Construction Services, Inc.; and Jason Todd Mogler fail to comply with this Order, the Commission may bring further legal proceedings against Respondent(s) including application to the Superior Court for an order of contempt.

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IT IS FURTHER ORDERED that pursuant to A.R.S. § 44-1974, upon application, the Commission may grant rehearing of this Order. The application must be received by the Commission at its offices within twenty (20) calendar days after entry of this Order, and, unless otherwise ordered, filing an application for rehearing does not stay this Order. If the Commission does not grant rehearing within twenty (20) calendar days of the filing of the application, the application is considered to be denied. No additional notices will be given of such denial.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN FORESE COMMISSIONER DUNN

COMMISSIONER TOBIN COMMISSIONER OLSON COMMISSIONER BURNS

IN WITNESS WHEREOF, I, TED VOGT, Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this 7th day of November 2017.

TED VOGT
EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____
JR/rt

SERVICE LIST FOR: TRI-CORE COMPANIES, LLC; TRI-CORE MEXICO LAND DEVELOPMENT, LLC; TRI-CORE BUSINESS DEVELOPMENT, LLC; ERC COMPACTORS, LLC; ERC INVESTMENTS, LLC; C&D CONSTRUCTION SERVICES, INC.; PANGAEA INVESTMENT GROUP, LLC; JASON TODD MOGLER; BRIAN N. BUCKLEY; CHERYL BARRETT BUCKLEY; CASIMER POLANCHEK; AND NICOLE KORDOSKY

DOCKET NO.: S-20867A-12-0459

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DECISION NO. 76452